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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No. 281

JAMES MARTIN MACINNIS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

JAMES MARTIN MACINNIS,
57 Post Street, San Francisco 4, California,
Petitioner In Propria Persona.

Dietrich-Walker Printing Co., San Francisco, California

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PETITION FOR WRIT OF CERTIORARI
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for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, James Martin MacInnis, respectfully petitions this Court to grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District Court of the Northern

District of California, Southern Division thereof, imposing three months' imprisonment for asserted criminal contempt of Court, which judgment and sentence was imposed under the purported authority of subdivision (a) of Rule 42, Federal Rules of Criminal Procedure, without notice or hearing, sixty-three days subsequent to the single act of asserted contempt mentioned in said judgment.

JURISDICTIONAL STATEMENT.

1. The jurisdiction of this Court is invoked under Title 28, U.S.C. 1254 (1) and Rule 38 of the Rules of the Supreme Court.

2. The decision of the Court of Appeals was rendered July 30, 1951.

3. The basis upon which it is contended that the Supreme Court has jurisdiction herein, and the cases believed to support such jurisdiction are, in part, as follows:

(a) Where a Circuit Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court, this Court has jurisdiction on certiorari to review the action of the Circuit Court of Appeals. (Rules of the Supreme Court; *Department of Treasury v. Ingram Richardson Manufacturing Co.*, 313 U.S. 252, 85 L. Ed. 1313, 61 S. Ct. 866; *Helvering v. Price*, 309 U.S. 409, 60 S. Ct. 673, 84 L. Ed. 836; *National Licorice*

Co. v. National Labor Relations Board, 308 U.S. 535, 60 S. Ct. 108, 84 L. Ed. 451; *Lane v. Wilson,* 305 U.S. 591, 59 S. Ct. 249, 83 L. Ed. 374.)

(b) Certiorari will be granted where a Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. (*Postal S.S. Corporation v. El Isleo,* 308 U.S. 378, 60 S. Ct. 332, 84 L. Ed. 335.)

(c) Certiorari will be granted where a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower Court as to call for an exercise of this Court's power of supervision. (*United States v. Rizzo,* 297 U.S. 530, 56 S. Ct. 580, 80 L. Ed. 844; *Le Tulle v. Scofield,* 308 U.S. 531, 60 S. Ct. 75, 84 L. Ed. 447; *McNabb v. United States,* 318 U.S. 332, 87 L. Ed. 918.)

(d) A writ of certiorari will issue on the ground of "importance" of the issue presented, or on other grounds similar to those covered by the rule. (*Federal Trade Commission v. Raladam Co.,* 316 U.S. 149, 62 S. Ct. 966, 86 L. Ed. 1336; *Williams v. Jacksonville Terminal Company,* 314 U.S. 590, 62 S. Ct. 64, 86 L. Ed. 476; *National Labor Relations Board v. Express Publishing Company,* 312 U.S. 426, 61 S. Ct. 693, 85 L. Ed. 930; *Sprague v. Ticonic National Bank,* 306 U.S. 623, 59 S. Ct. 463, 83 L. Ed. 1028.)

(e) A writ of certiorari will issue where important constitutional questions are involved. (*Glasser v. United States,* 315 U.S. 60.)

SUMMARY STATEMENT OF FACTS AND ISSUES.

I.

Your petitioner stands adjudged guilty of criminal contempt, and he is under sentence of three months' imprisonment for having on February 1, 1950, uttered twenty-three words during the course of the trial of the criminal case of *U.S.A. v. Harry Renton Bridges et al.* (R. 2-4, and 71-73.)

The order of contempt adjudging your petitioner to be guilty of such contempt was dated February 28, 1950, and was filed *ex parte* on March 1, 1950. (R. 2-4).

The sentence was pronounced on April 4, 1950. (R. 71-73).

There was thus a lapse of sixty-three days between the commission of the contempt (if contempt was committed), and the imposition of punishment.

The District Court purported to act under authority of subdivision (a) of Rule 42, Federal Rules of Criminal Procedure. (R. 2-4).

Your petitioner contends that under decisions of this Court, the imposition of punishment for contempt without notice or hearing, so long after the commis-

sion of the asserted contempt contravenes the "due process" clause of the Fifth Amendment,

(*In re Oliver*, 333 U.S. 257; *Cooke v. U. S.*, 267 U.S. 517, and *Ex parte Terry*, 128 U.S. 289)

and, in addition, contravenes the provisions of Rule 42, Federal Rules of Criminal Procedure.

II.

Your petitioner contends also that remarks made by the sentencing court at the time of sentence (R. 82-88) reveal that punishment was imposed not alone for the single act adjudged to be contempt, but also and inseverably for other and unspecified acts concerning which there has never been an adjudgment, and concerning which no certificate in conformity with Rule 42(a), Federal Rules of Criminal Procedure, was ever filed.

It is contended that this also constitutes a contravention of the "due process" clause of the Fifth Amendment and Rule 42, Federal Rules of Criminal Procedure, and is in conflict with holdings of this court in *Cooke v. U. S.*, infra; *Gompers v. Buck's Stove & R. Co.*, 221 U.S. 418, and *Toledo Newspaper Co. v. U. S.*, 247 U.S. 402 (on a point not overruled in *Nye v. U. S.*, 313 U.S. 33).

III.

Lastly, it is contended by your petitioner that the Court of Appeals completely ignored the factual defense of your petitioner which your petitioner had the opportunity to present for the first time in the Court of Appeals, and that by so doing, the Court of Appeals denied your petitioner the one and only hearing accorded by law to one who is sentenced for contempt without notice and hearing, and that such action by the Court of Appeals contravenes the "due process" clause of the Fifth Amendment and Title 28, U.S.C., Section 1291. To show that the Court of Appeals did in fact completely ignore the factual defense of your petitioner, there is set forth in an appendix to this petition and the brief in support thereof, a verbatim copy of those portions of the briefs filed by your petitioner in the Court of Appeals, in which such factual defense was presented and urged.

REASONS FOR THE ISSUANCE OF THE WRIT.

A writ of certiorari should be issued to review the judgment of the Court of Appeals affirming the contempt conviction for each of the following reasons:

(1) The decision of the Court of Appeals and the judgment of the District Court severally contravene the "due process" clause of the Fifth Amendment.

(2) The decision of the Court of Appeals and the judgment of the District Court severally contravene Rule 42, Federal Rules of Criminal Procedure.

(3) The decision of the Court of Appeals is contrary to the decisions of this Court in the following cases:

Ex parte Terry, 123 U.S. 289;
Cooke v. U. S., 267 U.S. 517;
Gompers v. Buck's Stove & R. Co., 221 U.S. 418;
Toledo Newspaper Co. v. U.S., 247 U.S. 402.

(4) The decision of the Court of Appeals, in Footnote 3 thereof, implies (R. 112, 113) that this Court by denial of certiorari in *U. S. v. Sacher,* 182 F. (2d) 416, and *Hallinan v. U. S.,* 182 F. (2d) 880, intended to overrule the holdings of this Court in *Cooke v. U. S.,* supra, and *In re Oliver,* supra, concerning what the requirements of "due process" are in matters of criminal contempt.

PRAYER THAT THE WRIT ISSUE.

WHEREFORE, the petitioner prays:

That this Court issue a writ of certiorari to the Court of Appeals of the Ninth Circuit, and that this cause be brought here for review and determination.

Dated, San Francisco, California,
August 24, 1951.

JAMES MARTIN MACINNIS,
Petitioner In Propria Persona.

Certificate of Counsel.

I hereby certify that I am the petitioner in the above entitled cause, and that in my judgment the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
August 24, 1951.

James Martin MacInnis,
Petitioner In Propria Persona.

(Supporting Brief and Appendices A and B Follow.)

In the Supreme Court
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No.

JAMES MARTIN MACINNIS, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE JUDGMENT OF THE DISTRICT COURT AND THE DECISION OF THE COURT OF APPEALS SEVERALLY CONTRAVENE THE "DUE PROCESS" CLAUSE OF THE FIFTH AMENDMENT AND THE PROVISIONS OF RULE 42, FEDERAL RULES OF CRIMINAL PROCEDURE.

(a) In relation to the time within which punishment may be imposed without notice and hearing.

This Court, in *In re Oliver,* 333 U.S. 257, decided March 8, 1948 (and following what this Court held

in *Ex parte Terry,* 128 U.S. 289, and *Cooke v. United States,* 267 U.S. 517) said, on page 275:

> "Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, *and where* **immediate** *punishment is* **essential** *to* **prevent** *'demoralization of the court's authority' before the public."*

Let us repeat: "* * * and where **immediate** punishment **is essential** to **prevent** 'demoralization of the court's authority' before the public."

In the case of *Cooke,* supra, this Court, on pages 534 and 535, said:

> "To preserve order in the court room for the proper conduct of business, *the court* **must** *act* **instantly** to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such *summary* vindication of the court's dignity

and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law. Such a case had great consideration in the decision of this Court in *Ex parte Terry*, 128 U.S. 289. It was there held that a court of the United States upon the commission of a contempt in open court might upon its own knowledge of the facts without further proof, without issue or trial, and without hearing an explanation of the motives of the offender, *immediately* proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law."

On page 536 this Court said:

"We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the "very hallowed place of justice," as Blackstone has it, is not **instantly suppressed and punished,** demoralization of the court's authority will follow. Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; but the **need** for **immediate penal vindication** of the dignity of the court **created it.**"

This Court, in the *Terry* case supra, held that a court of the United States had the inherent power, ***immediately upon the commission of a contempt*** in its presence, to proceed upon its own knowledge of the facts and punish the offender without further proof, and without issue or trial in any form.

In so holding, this Court, by numerous repetitions*,

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*Because on page 308, this Court said:

(1) "'• • • the offender may be *instantly* apprehended and imprisoned • • •'";

(2) "'• • • and *immediately* ordered into custody. • • •'";

(3) "'• • • Business cannot be conducted unless the court can *suppress the disturbance*, and the *only* means of doing this is by *immediate punishment*. • • •'";

(4) "'• • • It is a case that *does not admit of delay* and the court would be without dignity that did not punish it *promptly* and without trial • • •'";

And on page 309, this Court said:

(5) "'• • • For a direct contempt, the offender may be punished *instantly* by arrest and imprisonment • • •'";

(6) "'• • • *instantly punishing* • • •'";

(7) "'• • • *immediately* upon the commission, in its presence, of the contempt • • •'";

(8) "'• • • the ends of justice *demanded immediate* action • • •'";

And on page 311:

(9) "'• • • to order *immediate* imprisonment • • •'";

(10) "'• • • to immediate punishment • • •'";

(11) "'• • • there should be *no delay* upon the part of the court, in exerting its power to punish • • •'";

(12) "'• • • to inflict *instant* punishment. • • •'".

And on page 312:

(13) "'• • • to inflict *instant* punishment • • •'"; (a second use of the same words).

And on page 313:

(14) "'• • • proceed *at once* to punish him • • •'";

(15) "'• • • be instantly apprehended and *immediately* imprisoned • • •'";

And, finally, on page 314, this Court referred to such immediate adjudgment and punishment as

(16) "'• • • proceeding summarily • • •".

made it indisputably clear that it was the *need* for an *immediate* punishment to preserve the dignity and orderly process of the Court that gave rise to, and justified, such a power.

Commenting on its decision in the *Terry* case, supra, this Court, in the *Oliver* case, said, on page 274:

> "However, this court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the *suppression and punishment* of the court-disrupting misconduct which *alone* justified its exercise. Indeed in the *Terry* case the Court cited with approval its decision in *Anderson v. Dunn,* 6 Wheat. 2-4, 5 L. Ed. 242, which had marked the limits of contempt authority in general as being *'the least possible power adequate to the end proposed.'* Id., at page 231 of 6 Wheat. And see *In re Michael,* 326 U.S. 224, 227, 66 S. Ct. 78, 79, 90 L.Ed., 30.
>
> "That the holding in the *Terry* case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in *Cooke v. United States,* 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767, a contempt case arising in a federal district court."

And on page 275, this Court said:

> "Furthermore, the Court explained the *Terry* rule as reaching only such conduct as created 'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and

presence of the judge before the public' that, *if 'not instantly suppressed and punished, demoralization of the court's authority will follow.'* Id., at page 536 of 267 U.S., at pages 394, 395 of 45 S. Ct."

This brings us to a consideration of certain thoughts expressed by Mr. Justice Holmes in his dissenting opinion in the case of *Toledo Newspaper Co. v. U. S.*, 247 U.S. 402.

We feel free to quote these thoughts of Mr. Justice Holmes as *judicial authority* for the reason that the majority opinion in that case was later overruled by this Court in the case of *Nye v. U. S.*, 1941, 313 U.S. 33 (on page 52), and because this Court, in the latter case, cited that dissent of Mr. Justice Holmes *as reason in support of its decision* (on pages 51 and 52).

In his dissent in the *Toledo Newspaper Co.* case, Justice Holmes said, on page 423:

"* * * When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which, if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case 'to insure order and decorum in their presence' as is stated in *Ex parte Robinson*, 19 Wall. 505. See *Prynne, Plea for the Lords*, 309, cited in *McIlwain, The High Court of Parliament and its Supremacy*, 191. And when the words of the statute are read it seems to me that the limit is too plain to be construed away. *To my mind they point and*

> ***point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity*** * * *"

Let us repeat, "To my mind, they point and point *only* to the *present protection* of the Court from *actual interference,* and *not to postponed retribution* for lack of respect for its dignity.

The statute to which Mr. Justice Holmes was referring was Title 18, U.S.C. Section 401 (1), such being the statute under which the District Court purported to act in this case. (R. 71.)

On pages 425 and 426, Mr. Justice Holmes, in the same dissenting opinion, said:

> "* * * I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, ***but when there is no need for immediate action, contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts. Action like the present in my opinion is wholly unwarranted by even color of law*** * * *"

Since the *Terry, Toledo, Cooke,* and *Nye* cases were decided, the Federal Rules of Criminal Procedure have been adopted. Rule 42 thereof, which deals with Criminal Contempt, attempts to state succinctly in rule form, what this Court held in the *Terry* and *Cooke* cases. That this is so is evidenced by the notes which the Advisory Committee on Rules annexed to

the two subdivisions of Rule 42. Thus the note annexed to subdivision (a) reads:

"This rule is substantially a restatement of existing law. *Ex parte Terry,* * * * *Cooke v. U. S.* * * *"

Rule 42 reads as follows:

"Rule 42. Criminal Contempt

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's

consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

The phrase "summary disposition" in the subtitle of subdivision (a) of the rule, and the phrase "punished summarily" in the body of such subdivision unquestionably have relation to the phrase "proceeding summarily" on page 314 of the *Terry* case, and to the phrase "such summary vindication" on page 534 of the *Cooke* decision, and thus to the fifteen instances in the *Terry* case where this Court used such terms as "instantly", "immediately", "no delay", "at once", "promptly", and the like, and to the clause "the court must act instantly", and "immediately proceed to determine whether the facts justified punishment and to inflict punishment" contained on page 534 of the *Cooke* decision.

In this connection, it should be observed that the word "summary", as used in relation to the law, has a primary meaning and a secondary meaning; that the primary meaning is "done without delay", and that the secondary meaning is *(thus)* "done without formality" (which would occasion delay).*

The Court of Appeals, in this case, without any discussion of the meaning of the word "summary", has assumed it to mean only "without formality", and as not requiring immediate, or even prompt, action.

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*See Webster's New International Dictionary, Funk and Wagnall's New Standard Dictionary, Century Dictionary, and Oxford Dictionary, for varying expressions of this primary-secondary meaning sequence.

It is *only* the *need* for *immediate* action which empowers a court to proceed without the formalities of notice and hearing in any matter of contempt. Where such a *need* does not exist, either because the contempt does not disrupt, or tend to disrupt, the orderly process of the Court, or *because of lapse of time,* the power to proceed without the formalities of notice and hearing *does not exist.*

To say this in a more graphic way: the power to punish summarily for contempt may be likened to a short whip, the sole function of which is to enable the Court to *repeal and subdue* assaults upon its dignity and orderly procedure which are at once *both* immediate in point of time, and at close range in point of space. When an assault is not at close range in point of space (that is, where it is indirect), there is no need for such a power, for the long whip of notice and hearing is fully capable and better suited to repel and subdue it. Similarly, when an assault is not immediate in point of time, there is no *need* for such a power, for, again and equally, the long whip of notice and hearing is fully capable and better suited to repel and subdue it. The "due process" clauses of the Constitution of the United States preclude the use of the short whip where the *need* for its use either has not come into existence, or, having come into existence, has ceased to exist as the result of cessation of the attack and failure to use it while the attack was still in progress, *or so recently in progress as to be deemed still in progress.*

What we have just said is in complete harmony with what this Court said in the *Terry, Cooke,* and *Oliver* cases, and with what Mr. Justice Holmes said in the *Toledo* case. It gives full effect to the requirement of "due process" by limiting the exception to *"the least possible power adequate" to the preservation of order and dignity of the Court.* Moreover, giving to the word "summarily" its full meaning—instead of only its secondary meaning—this is precisely what Rule 42, Federal Rules of Criminal Procedure, provides and was intended to provide.

Under subdivision (b) of Rule 42, *all* criminal contempt may be punished on notice and hearing, *including those criminal contempts which are also punishable under subdivision (a) of the rule.* Where a Court does not *immediately* punish a criminal contempt which is punishable summarily under subdivision (a), the power to punish that contempt does not lapse—all that lapses is the power to punish it without notice and hearing.

This fact has been completely ignored by the Court of Appeals in its decision in this case. No consideration whatever is given to subdivision (b) of Rule 42. From a reading of the decision of the Court of Appeals, it would appear that the District Court had to punish your petitioner without notice and hearing, or to let him go unpunished.

Where a Court does not exercise the power to punish immediately, and the proceedings in that Court resume a peaceful and orderly tenor, there is no

longer any disturbance to be suppressed, and there is no need to punish that passed contempt without notice and hearing.

In this case, the asserted act of contempt occurred prior to the midmorning recess on February 1, 1950. (Compare R. 4, 34, and 35.) The asserted act of contempt consisted of the utterance of twenty-two words. (R. 3 and 4.) After those words were spoken, the Court made a one hundred eighty three word statement to the jury without interruption, and a recess was then taken. (R. 35-36.) After the recess, the trial continued in an orderly fashion. (R. 36 et seq.)

To quote from the decision of the Court of Appeals:

> "On February 2, 1950, the day following the occurrence, the trial judge announced that after reading the transcript, he had concluded that appellant had on the previous day committed conduct in the actual presence of the court constituting contempt, and that a certificate and order would be filed pursuant to Rule 42, and that punishment would be deferred to a later date." (R. 112-113.)

Such announcement by the trial judge was made at the end of the court day on February 2, 1950. (R. 100-101.) It will be observed that it was only *"after reading the transcript"* of the previous day's proceedings that the trial judge *"had* concluded" that your petitioner *"had on the previous day* committed conduct * * * constituting contempt * * *", and, thus, that the punishment *"deferred to a later date"* was

not to be imposed to *suppress a disturbance* or *"for the present protection of the Court from actual interference", but was to be imposed* as *"postponed retribution for lack of respect for"* the trial Court's "dignity". Moreover, that this is so appears on the face of the decision of the Court of Appeals. In other words, "the need for immediate penal vindication of the dignity of the Court" which is "required to justify the exception", and which "created it" was patently lacking in this case, and the decision of the Court of Appeals reveals on its face that such need was patently lacking.

Moreover, the announcement of the trial judge on February 2, 1950, did not adjudge your petitioner guilty of an act of contempt. It merely expressed the intention of the trial judge to thereafter so adjudge your petitioner. Such an adjudgment was not made until March 1, 1950, when the first Order on Contempt and the accompanying certificate, purportedly in conformity with Rule 42 (a), Federal Rules of Criminal Procedure, were filed. (R. 2-4.)

Even then your petitioner was not punished. The punishment was not imposed until April 4, 1950, when sentence was pronounced, and the second order on contempt was filed. (R. 71-73.)

Certainly one who is not punished until sixty three days later is not summarily punished. In the *Cooke* case, supra, a delay of eleven days was, on page 537, disapproved.

The argument advanced by the Court of Appeals to the effect that subdivision (a) of Rule 42 merely requires "as speedy a vindication as is practicable in the circumstances and does not require steps which would break up a trial and frustrate the powers of the judge" (R. 112), overlooks the fact that the Court can immediately adjudge the contemnor guilty of contempt, and *immediately* impose sentence, and then, *in the same breath,* suspend the execution of sentence until after termination of the trial, and then not file the certificate required by subdivision (a) of Rule 42 until the termination of the trial. In other words, the requirement that the contemnor be summarily punished relates to the pronouncement of sentence, and does not require that execution commence immediately, nor does it require that the requisite formal papers be immediately filed. See *U. S. v. Hall,* 176 F. (2d), 163.

Moreover, no frustration of the powers of the Court, as distinguished from the judge, would occur as long as power to punish the contempt on notice and hearing continued. All that would be "frustrated" in the event that punishment were not immediately imposed by sentence, would be the power of the judge to punish without notice and hearing.

The argument made by Judge Frank in his concurring opinion in the case of *U. S. v. Sacher,* 182 F. (2d) 416 at 459, that a contemnor would not be prejudiced by delay in the pronouncement of sentence, permits us to point out that, where punishment is not

imposed immediately to quell a disturbance, it is affirmatively indicated, by the judge's non-action, that there is no disturbance which needs quelling, and that the subsequent imposition of punishment without notice and hearing most likely follows as the result of a "slow burn" on the part of the judge—a rising passion—a developing indignation—which does, in a very real sense and degree, prejudice the one so sentenced. Indeed, if imposition of punishment without notice and hearing can be delayed sixty-three days, the judge may—as the trial judge did in this case—measure the punishment to fit not only the act of contempt adjudged and certified, but also to fit other acts, including subsequent acts concerning which no judgment of contempt or certificate in conformity with Rule 42 (a) is ever filed, including acts which nettled the judge but did not amount to misconduct or contempt.

This is a matter which affects not only your petitioner, but all members of the bar of our nation. To paraphrase what Mr. Justice Jackson said, on September 25, 1950, in *Williamson v. U. S.*, ... U.S. ....., "But the right of every" lawyer to fair "treatment before the law is wrapped in the same constitutional bundle with those of" your petitioner. "If in anger or disgust with" your petitioner, "we throw out the bundle, we also cast aside protection for the liberties of more worthy" lawyers. And, as Mr. Justice Jackson said in the same opinion, "Judge Cardozo wisely warned of 'the tendency of a principal to extend itself to the limits of its logic.' "

In other words, if a judge can delay sixty-three days in the imposition of punishment, he can delay ninety days, or one hundred eighty days, or three hundred sixty-five days, or as long as the trial and post-trial proceedings continue. If he can take into consideration, in the fixing of punishment for the one act adjudged to constitute contempt, and certified as required by subdivision (a) of Rule 42, an act on the next succeeding day, without adjudging it to constitute contempt or certifying it as required, he can take into consideration in fixing that punishment innumerable subsequent acts including acts which do not amount to misconduct or contempt. Once the way is left open, there is no practical limit to the flow which may follow. To repeat, "the tendency is for a principal to extend itself to the limit of its logic".

Conversely, if, when punishment is not immediately imposed, notice and hearing must be given as required by subdivision (b) of Rule 42, the essential facts constituting each act of contempt would have to be stated in the notice, and where any of those acts involved disrespect to, or criticism of, the judge, the accused would be entitled to a hearing before another judge, and the punishment would be measured only by those charges of contempt, the essential facts of which were so stated, and which, after hearing, were found to be true.

Concerning the argument which we made in the Court of Appeals on this point, the Court of Appeals in footnote numbered "3" annexed to its decision says:

"In support of the point counsel cites *Toledo Newspaper Company v. United States,* 1918, 247 U.S. 402, dissenting opinion of Justice Holmes, majority decision overruled in *Nye v. United States,* 1941, 313 U.S. 33, 42; *Cooke v. United States,* 1925, 267 U.S. 517; *In re Oliver,* 1948, 333 U.S. 257. We concede that some of these cases contain language of comfort to him. We think, however, that the law does not require the interruption of the trial by immediate sentence upon summary holding for contempt. Recent attempts by attorneys to obstruct the due process of justice have demonstrated that immediate sentence could, and in some cases would, lead directly to the contemnor's success in using unethical and unprovoked tactics to delay and defeat the court's progress in the administration of justice. We concede also that there is some logic in appellant's contention on the instant point, as recited in the *Toledo* case, supra, but we think the better view is as is held in *United States v. Sacher,* 1950, 2 Cir., 182 F. (2d) 416, and in our own recent case of *Hallinan v. United States,* 1950, 9 Cir. 182 F. (2d) 880, certiorari denied____ U.S. ..... We recognize that admonishment has followed admonishment, that refusal of the Supreme Court to grant certiorari is not a holding as to any point presented in the petition for certiorari. But where two important theories clash we, as an intermediate court, can take some comfort at least from the fact that the denial is not inconsistent with our views." (R. 112-113)

Because the Court of Appeals concedes that the *Cooke* and *Oliver* decisions of this Court and the dis-

senting opinion of Mr. Justice Holmes in the *Toledo* case (which was later adopted by reference by this Court in its decision in the *Nye* case), gives your petitioner comfort and logical support. Thus also the Court of Appeals asserts that the theory of your petitioner as so supported by the decisions of this Court *clashes* with the theory of its decision in this case. What is more important still—the Court of Appeals expressly *"takes comfort"* in support of its decision in this case, from the fact that the acts of this Court in denying certiorari in the cases of *Sacher v. U. S.*, supra, and *Hallinan v. U. S.*, 182 F. (2d) 880, are *"not inconsistent"* with its decision in this case.

As we read that footnote, and as we think the members of the bench and bar of our nation will read it, the Court of Appeals is of the opinion in effect that the members of this Court regard the theory announced in the *Cooke* and *Oliver* cases, and expressed by Mr. Justice Holmes in the *Toledo* case, as being ancient and outmoded aphorisms* to be left to repose in the sepulchre of the past without ceremony by denial of certiorari without any overruling opinion. Obviously the Court of Appeals expects this Court

*We use the phrase "ancient and outmoded aphorisms" advisedly, for when the Court of Appeals said, in justification of its decision: "Recent attempts by attorneys to obstruct the due process of justice have demonstrated that immediate sentence could, and in some cases would, lead directly to the contemnor's success in using unethical and unprovoked tactics to delay and defeat the court's progress in the administration of justice", it in effect said that the rule announced by this Court in the *Cooke* and *Oliver* cases had, by reason of recent events, outlived its utility.

to confirm such opinion simply by denying certiorari in this case.

Particularly because of that footnote, we feel certain that if this Court denies certiorari in this case, a precedent will have become established—a precedent which, in practical effect, will overrule and nullify the theory so expressed in the *Cooke, Oliver,* and *Toledo* cases. We think that such a precedent will be established because the members of the bar, after reading the *Sacher* and *Hallinan* decisions, and the decision of the Court of Appeals in this case, *including particularly that footnote* (and after observing that this Court has denied certiorari in all three cases), will conclude that further appeal to this Court on the subject would be idle.

In our judgment, the theory so expressed in the *Cooke, Oliver,* and *Toledo* cases, instead of being ancient and outmoded aphorisms, is living viscera which cannot be severed from our Constitution without doing vital injury to that Constitution. To say this in another way, the overruling of the holdings of this Court in the *Cooke* and *Oliver* cases would amount to a narrowing of the "due process" clauses of the Fifth and Fourteenth Amendments, and in a way which would seriously impair the "right of counsel" clause of the Sixth Amendment. If this is the desired judicial result, this Court ought to enlighten the bench and bar of our nation by its written opinion setting forth such reasons as may now impel the Court to depart from its holdings in the *Cooke* and *Oliver* cases.

(b) In relation to the action of the trial Court in measuring the punishment to fit not only the single act of contempt adjudged and certified, but also, and inseverably, other acts concerning which there has been no adjudgment and no certificate in conformity with Rule 42 (a), Federal Rules of Criminal Procedure.

The punishment imposed upon your petitioner was measured to fit not only the single asserted act of contempt for which your petitioner was adjudged guilty of contempt, and concerning which a certificate was filed, but also to fit an unspecified number of unidentified acts concerning which there was no adjudgment of contempt and no certificate filed. That this is so is made manifest by what the trial judge said at the time he sentenced your petitioner.

The trial judge at that time said in part as follows:

> "I desire to address myself briefly to Mr. Hallinan *and Mr. MacInnis. And I say to you that from the beginning of this trial you have embarked upon a course of conduct designed and calculated to contemptuously provoke the Court in the hope that such provocation would lead the Court to commit error or plunge the case into a mistrial.*
>
> *"That such was your purpose has been entirely manifest to me. Such conduct* is not alone an affront to the dignity of the Judiciary of the United States, it is an affront to the dignity, good name and honor of a great profession. I said to *you,* and I repeat, that members of the bar are officers of the court. My experience has demonstrated that a vast majority of lawyers, in and out of court, conduct themselves with propriety, integrity, dignity and honor.

> "*Your* assault on this Court cannot go unchallenged, and I am determined, so far as I am able, in my humble capacity, *that such behavior* as displayed by you shall not be repeated in other Federal courtrooms. America is justifiably proud of its judicial system, and anyone who attempts to degrade it or weaken it is working an injustice."
>
> (R. 82-83.)

The trial judge then addressed Mr. Hallinan, and sentenced him to six months imprisonment for a number of asserted acts of contempt (R. 83-85), following which Mr. Hallinan was permitted to make a statement. (R. 85-87.) The trial judge then addressed your petitioner, saying:

> "With regard to James Martin MacInnis, this Court heretofore, and on the 28th day of February, 1950, regularly adjudged James Martin MacInnis guilty of contempt of this Court. The matter of judgment and sentence having been stayed and deferred until the completion and conclusion of the trial, and the trial having been concluded and terminated, now said James Martin MacInnis is sentenced to serve three months in an institution to be designated by the United States Attorney General or his authorized representative. *Although, in my opinion, Mr. MacInnis' contemptuous conduct was just as studied* and flagrant as that of Mr. Hallinan, nevertheless I*

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*The remarks of petitioner set forth in the certificate could not have been studied, for they were in immediate response to conduct of Judge Harris which no one could have anticipated.

Moreover, part of the asserted conduct of your petitioner for which punishment was so imposed upon him consisted of matters which the trial judge could have neither seen nor heard, in that

feel he is entitled to a lesser sentence, for the reason that he appears to have been, to some extent at least, inspired by his senior colleague, Mr. Hallinan."

(R. 87-88.)

From the foregoing, it is manifest that the sentence on appellant was imposed not only as *"postponed retribution for lack of respect for" the dignity of Judge Harris, but was imposed, in inseverable part, for acts of appellant "from the beginning of the trial"—and, inferentially, to its end—concerning which no mention is made in the one and only adjudgment of contempt, and in the one and only certificate filed by Judge Harris, and concerning which Judge Harris at no time adjudged appellant to be in contempt of Court.*

In its decision, the Court of Appeals says:

> "The court's reference to the general conduct of counsel throughout the trial does not indicate that either the judgment of contempt or the punishment therefor rests upon such conduct. The court found appellant's statements to be contemptuous and measured the punishment to fit the offense. The court's remarks constitute an explanation of the fact that counsel's conduct other than the contemptuous remarks was such

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if they had occurred at all, they occurred within the mind of your petitioner; i.e.:

". . . designed and calculated to * * *" etc.; and "* * * That such was your purpose has been entirely manifest to me. Such conduct * * *" etc.; and "* * * in my opinion, Mr. MacInnis' contemptuous conduct was just as studied * * *" etc.

Subdivision (a) of Rule 42 authorizes punishment only for conduct which the court saw and heard, and which "was committed in the actual presence of the court".

that the contemptuous statements would not be condoned."
(R. 114-115).

The Court of Appeals' conclusion in this respect is in inescapable conflict with what this Court said in *Cooke v. U. S.*, supra, on page 538:

> "* * * On the other hand, *when the Court came to pronounce sentence,* it *commented* on the conduct of both the petitioner and his client in making scandalous charges in the pleadings against officials of the court and charges of a corrupt conspiracy against the trustee and referee in bankruptcy, and in employing a detective to shadow jurymen while in charge of the marshal, and afterwards to detect bribery of them, in proof of which the court referred to a sworn statement of the detective in its hands, which had not been submitted to the petitioner or his client. When Walker questioned this, the court directed the marshal to prevent further interruption. *It was quite clear that the court considered the facts thus announced as in aggravation of the contempt.* Yet no opportunity had been given to the contemnors even to hear these new charges of the court, much less to meet or explain them, before the sentence. *We think the procedure pursued was unfair and oppressive to the petitioner.*"

See also *Gompers v. Buck's Stove & R. Co.*, 221 U.S. 418, beginning at the bottom of page 439, and continuing to the end of page 440; *Toledo Newspaper Co. v. U. S.*, supra, beginning at the bottom of page 421; and *Irving Blau v. U. S.*, 95 L.Ed. Adv. Op., 234-236, footnote 2.

(c) In relation to denial of "due process" by Court of Appeals by refusing to consider petitioner's factual defense.

When, on February 2, 1950, the judge of the District Court announced that he intended, at a later date, to adjudge your petitioner guilty of contempt, and impose punishment, both your petitioner and Vincent Hallinan unsuccessfully attempted to obtain recognition from the Court for the purpose of *defending your petitioner.* (R. 100-101.) Twenty-eight days later, the first order on contempt and the certificate of the judge were filed *ex parte.* (R. 2-4.) On April 4, 1950, when the trial judge again brought up the matter, he stated to your petitioner and Vincent Hallinan:

> "Now I have several matters affecting counsel. I might ask counsel to permit me *without interruption* to say what I have to say, and *hereafter* (sic. thereafter), *at the conclusion,* you *may* interpose whatever *legal motion* you may desire, or any individual request on your behalf, or either of your behalves". (R. 82.)

The trial judge then proceeded to sentence, first, Mr. Hallinan, and then your petitioner. (R. 82-88.) Thus your petitioner was not accorded the privilege of saying anything in his own defense until *after* he was sentenced.

It is worthy of note that, when first permitted to speak, your petitioner said *inter alia,* **"Anything I said I may have said in haste, but I said it in an effort to preserve a judicial atmosphere in this room."** (R. 89.)

Your petitioner had a factual defense, a factual explanation, a factual justification. He presented it at the first opportunity, that is, in the Court of Appeals. As so presented, it was, except for two incidental facts, stated in a footnote, *based entirely* upon the record certified to the Court of Appeals by the Clerk of the District Court. It was presented in the only way that your petitioner could present it, namely, in the briefs which he filed in the Court of Appeals.

Set forth in the appendix to the present petition and this brief is a verbatim copy of those portions of the briefs which your petitioner filed in the Court of Appeals which deal with that factual defense.

Except for the statement (R. 109) that:

> "Appellant's first specification of error is that none of the matters set forth in the certificate of contempt, taken either singly or collectively, constitute contempt.",

the decision of the Court of Appeals completely ignores your petitioner's factual defense. More particularly, that defense, without being stated except as above set forth, is rejected *as a matter of law*. It is done so in these words:

> Counsel "*never* has the right to let his temper, his zeal, or his intention lead him into disrespectful, accusative language to the court." (R. 109),

and:

> "The act of addressing the court in open session with the statements 'you should cite yourself for misconduct', and 'you ought to be ashamed of

yourself', unmodified, are, per se, contemptuous." (R. 110.)

The factual defense of your petitioner included the showing that, just prior to the utterance of such remarks by your petitioner, the trial judge had, *in unmistakable effect, and falsely,* accused your petitioner of lying, and, inferentially, of trying to deceive the jury. (See appendix: Opening brief for appellant, page 43, subtitle 3, through subtitle 5, page 49; and reply brief for appellant, page 5, second paragraph, through page 10, top paragraph.)

Indeed, the decision of the Court of Appeals reveals, on its face, that the District Judge had, in unmistakable effect, accused your petitioner of lying, for in quoting from the record, the decision of the District Court includes this:

> "The Court. * * * Mr. MacInnis invited it.
>
> Mr. MacInnis. I never heard of such a question.
>
> The Court. Mr. MacInnis invited me to ask the question." (R. 107.)

That categorical contradiction of your petitioner, *in unmistakable effect, accused* your petitioner of having *lied* when he said that he had never heard of such a question. It constituted a *personal assault* by the judge on the *personal honesty and integrity* of your petitioner.

Had the judge said to your petitioner, "You are a liar", instead of "Mr. MacInnis invited me to ask

the question", would it have been *"per se, contemptuous"* for your petitioner to have said "You should cite yourself for misconduct", and "you ought to be ashamed of yourself"?

We think not. We think that, viewed in their setting, such remarks would have been fully justified, and, if not fully justified, at least patently excusable.

At any rate, such a defense would have had sufficient substance to it, sufficient reasonableness, as to merit consideration, and not to be peremptorily rejected *as a matter of law.*

The Court of Appeals, in its decision, ignores this portion of your petitioner's factual defense by the statement:

> "A sufficient record of counsel's objection to the court's statements had been made prior to counsel's statements to which the court took exception." (R. 109, 110.)

No record of counsel's objection to the statement *"Mr. MacInnis invited me to ask the question"* had been made. That statement had not been assigned as misconduct. The only previous assignment of misconduct related to the asking of the question *"Have you been recently subjected to medical treatment, Father?"* Thus, by the above quoted statement in its decision, the Court of Appeals has made it clear that your petitioner's remarks were directed toward the asking of that question, and not, as they actually were, to the personal assault which the trial Court made on your petitioner's integrity.

The foregoing relates only to a fraction of the factual defense made by your petitioner and ignored by the Court of Appeals.

The fact that the District Judge did not use the word "liar" makes little difference. He patently called your petitioner a liar without that word.

In rejecting the factual defense of your petitioner without examination, the Court of Appeals not only committed error, but it denied *"due process of law"* to your petitioner, in that it denied him the hearing on that issue which the law accords to him.

CONCLUSION.

For the foregoing reasons, petitioner submits that a writ of certiorari should be granted in this case.

Dated at San Francisco, California,
August 24, 1951,

Respectfully submitted,
JAMES MARTIN MACINNIS,
Petitioner In Propria Persona.

Appendix

INTRODUCTION.

This appendix reprints, without alteration, the argument made by petitioner in the Opening Brief for Appellant, filed in the Court of Appeals in support of his contention that none of the matters set forth in the Certificate of Contempt, either singly or collectively, constituted contempt, and the Reply Brief for Appellant, filed in the Court of Appeals, all of which is devoted to a discussion of that one contention.

Appendix A

EXCERPT FROM OPENING BRIEF FOR APPELLANT.

IV.

SUMMARY OF BACKGROUND FACTS.

In addition to the facts hereinbefore mentioned, the background facts of the case are as follows:

The asserted acts of contempt occurred during the course of a criminal trial in which appellant was appearing as counsel for two of the three defendants. The charges against the three defendants were, in substance, that the defendant Bridges had committed perjury in testifying in a naturalization case that he was not and had not been a member of the Communist Party, that the other two defendants had aided and abetted him in the commission of such perjury and that the three had conspired to have the defendant

Bridges defraud the government of the United States by committing such perjury.

The trial of said criminal case commenced on November 14, 1949 and ended on April 4, 1950. The asserted contempt occurred on February 1, 1950, during the early stages of the presentation of the Defense case and while Father Paul Meinecke, a Roman Catholic Priest, was on the stand as a character witness for the defense.

Father Meinecke had testified that he had been stationed in San Francisco for a period of about ten years commencing in 1936 or 1937, and while in San Francisco had been the organizer of The Association of Catholic Trade Unionists, an instrument of the Roman Catholic Church organized specifically at the wishes of Pope Pius XI [to combat Communism in labor unions (R. 44)]. That during those ten years he had been in close contact with the defendant Bridges and had discussed Bridges with many persons and that in his opinion Bridges was not only a truthful, honest, and upright man, but he was more, and that he would not publicly be known as a very good friend of Bridges had he the slightest doubt of his character (R. 5 to 11).

On cross examination he testified that he had heard rumors that Bridges was a Communist and had made it his business to investigate that very thing, that in his opinion Bridges was not a Communist but only a militant trade unionist and that if he had "the slightest notion" or "any suspicion whatsoever" that

Bridges was a Communist, he would not be there as a witness for Bridges or a friend of Bridges (R. 15, 16) and that his opinion concerning Bridges' character was largely dictated by public opinion, that is the opinion of others, their estimation of the man (R. 22, 23).*

As soon as the cross examiner stated that he had no further questions Judge Harris undertook to cross examine Father Meinecke and it was during the cross examination of the priest by Judge Harris that the asserted act of contempt occurred.

V.

ARGUMENT.

APPELLANT'S FIRST POINT.

NONE OF THE MATTERS SET FORTH IN THE CERTIFICATE OF CONTEMPT, EITHER SINGULARLY OR COLLECTIVELY, CONSTITUTE CONTEMPT.

When defense counsel, during the course of a criminal trial, and in the presence of the jury, says to the judge presiding, "You should cite yourself for misconduct. * * * I have never heard anything like that. You should be ashamed of yourself.", every *appearance* of contempt of Court is present. Yet, as we all

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*In view of the charges against the defendants and in view of the known stand of the Roman Catholic Church with respect to Communism and Communists this testimony of Father Meinecke "was", as we say later in this brief, "like the testimony of a recording angel in favor of a person on trial for a heresy which he denied".

know, *appearances are often deceiving.* It is so in this instance.

The statements of appellant above quoted, and set forth in the certificate of U. S. District Judge George B. Harris as the act of contempt for which the punishment is imposed on appellant, did not constitute an act of contempt of Court but were, in all particulars, pertinent and proper. By this we mean several things. (1) We mean that Judge Harris should have cited himself for misconduct. (2) We mean that Judge Harris should have been ashamed of himself. (3) And we mean that appellant was not only within his rights, but was compelled by his duty as counsel, to call the two foregoing facts to the attention of *both the Court* **and the jury,** and to do so in *forceful and unmistakable language.*

To show that these things are so, we must explore the transaction in some detail along several separate but converging avenues, and along several crossroads which tie those converging avenues together at various distances from the point of convergence.

ONE.

Let us begin this exploration by examining one of the recitations made by Judge Harris in the Certificate which he signed and filed, and which forms a part of the judgment.

It is as follows:

"* * * After propounding several questions, the Court asked a *proper and pertinent question, di-*

rected toward the physical well-being of the witness, to wit:

'Q. Have you been recently subjected to medical treatment, Father? * * *' "

It will be observed that the portions of this recitation which we have emphasized constitute an *expression of opinion* on the part of Judge Harris, and are *self-serving in nature,* that is, that they are designed to exculpate Judge Harris from any error, fault, or blame in the asking of the quoted question and to highlight the remarks of appellant in such a way as to indicate that those remarks were absolutely inexcusable.

If, by the term *"physical well-being",* Judge Harris intended to convey the thought of *bodily health* as distinguished from *mental health,* this recitation in the certificate is *demonstrably false,* or, in other words, it is not only not supported by the record, but the record, and particularly the record of Judge Harris' own words, *prove* that it is false.

(It should here be stated that whether the question was directed toward the *bodily health* or the *mental health* of Father Meinecke is of vital importance. That this is so will be hereinafter shown.)

First: observe that the quoted question, directed as it was to *a character witness* in a criminal trial, would have been *both irrelevant and immaterial,* and, therefore, *neither proper nor pertinent,* if it were directed toward the **bodily health,** *as distinguished from the*

mental health, of the witness. This is to say: the ***mental health*** of the witness would have had a bearing on the credibility of the witness, on the trustworthiness of his testimony, whereas the ***bodily health*** of the witness could have had **no** bearing ***either on that subject or upon any other possible issue of the case.***

From this we see that the recital of Judge Harris that the question was "a proper and pertinent question" is in conflict with the further recital of Judge Harris that the question was "directed toward the physical well-being of the witness" *if* Judge Harris, by the term "physical well-being", intended either to exclude, or to ignore, or to point away from, or even to encompass anything other than, the **mental health** of Father Meinecke.

Second: observe the word **"subjected"** in the quoted question, viz.: "Have you been recently **subjected** to medical treatment, Father?"

The word "subjected" is derived from the two Latin words meaning *under* and *throw*. It means: "to **make subject** *to some action or agent.* To *expose* to *the operation of some law or agency.* To place before for consideration **and disposition. To subdue.** To lay or spread before; **place beneath.**" Funk & Wagnall's Desk Dictionary.

A person who, of his own volition, goes to a physician for diagnosis and treatment is not being **"subjected"** to medical treatment. Persons who have bodily as distinguished from mental ills are not normally **subjected** to medical treatment. Conversely,

persons who are suffering mental illness are frequently **subjected,** ***by the will or compulsion or coercion*** **of others,** to medical treatment.

Thus the word **"subjected"** in the quoted question had a connotation pointing in the direction of *mental* illness rather than in the direction of *bodily* illness.

Third: the record discloses that the four questions immediately preceding the quoted one about recent medical treatment were all directed toward the state of Father Meinecke's *memory* and *orientation.* The record in this respect reads as follows:

"The Court. **Now, to what other extent did your memory** (4793) **become refreshed by your conversation with Mr. MacInnis?**

A. I was trying—I know that questions would be asked of me and I wanted to try to be direct and factual and to the point and not hedge. So the first thing we had to agree on was what year I first got to know Harry Bridges, and then——

Q. **Do you have difficulty, Father, with your memory or recollection under ordinary conditions?**

A. In Nevada there are no clocks and no calendars. We don't know one day from another, and it is easy for one to become careless about pegging dates, although I wasn't that way when I was here in San Francisco.

Q. **In San Francisco, Father, you were perfectly conversant and well oriented, weren't you, with respect to dates and the like?**

A. That's right.

Q. **Since you went to Nevada your orientation has become poor, has it?**

A. No; the years have sort of run together. I say a couple of years ago, and then I remember back, it was 15 years ago."
(R. 32-33.)

From the sequence and context of that portion of the record above quoted, it is unmistakably indicated that the question about recent medical treatment *was* a continuation of the subject dealt with in the preceding four questions, that is, that it was directed toward the state or condition of Father Meinecke's mind.

Note: that, in the questions and answers above quoted, it was Judge Harris and not Father Meinecke who injected and repeated the word "oriented" and "orientation", thereby *suggesting* that Father Meinecke was *mixed up and confused mentally;* that the question, *"Since you went to Nevada your orientation has become poor, has it?"* was in form and substance in the nature of an *accusation,* being *converted* into a question only by the terminal phrase "has it."; and, that the word *"subjected"* in the question about recent medical treatment carried forward the same *accusation* and renewed and fortified the implication and innuendo of the words *"oriented"* and *"orientation."*

Fourth: we call attention to the fact that between the question and the quoted remarks of appellant which Judge Harris has adjudged to constitute contempt more than a page of transcript occurs and that a part thereof reads as follows:

"The Court. There is no impropriety in my questioning.

Mr. MacInnis. I say there is.

The Court. He **asserted*** his present *memory* is not good. I asked him whether or not **his recollection** was good while he was here years ago. He said yes, it was years ago. **I don't see any reason for the criticism.**" (R-34.)

The latter statement by Judge Harris was made within a minute, (or, at most, a minute and a half), of the time he completed the question about being recently subjected to medical treatment, **and it was made in justification of the asking of that question.** Do not the words **"memory"** and **"recollection"** unmistakably reveal that, **so soon** after the quoted question was asked, Judge Harris **was thinking of it** *as a question directed toward the state of Father Meinecke's* **mind?**

Fifth: later the same day (after a mid-morning recess), Judge Harris made a statement to the jury (which we hereinafter call an apology) concerning his purpose in asking the quoted question. During the course of that statement, or apology, Judge Harris said:

"Latterly, in my examination of Father Meinecke some mention was made by counsel concerning the asserted impropriety of a question on my part to the Father. I might say to you that that was not born of any desire on my part, nor was it designed to inquire into Father Meinecke's

*Father Meinecke made no such assertion.

mental processes. Nor was it to reflect upon his integrity. *The question was born and conceived out of a desire on my part to accord fairness to the witness, for the reason that mention was made during the course of this testimony that he left San Francisco for Nevada; an inference might be drawn from that departure that it had something to do with activities in trade unionism and the like.* The Father on the witness stand volunteered that he asked to be transferred. I merely wanted to inquire, ladies and gentlemen, a very simple question, *not born of curiosity on my part, but born of a desire to provide you with all the facts surrounding the Father, and it was to the end that I might inquire as to his health. Very many people have to leave large metropolitan areas to go to less burdensome parishes and that was the reason underlying my question.*"
(R. 38-39.)

The foregoing explanation will bear painstaking analysis.

A. Note the clause, *the positive statement:* "The question *was* born and conceived out of a desire on my part to *accord fairness* to the witness, * * *"

This statement unmistakably implied that the testimony of Father Meinecke, *as it then stood,* gave the jury *ground or reason* to look upon Father Meinecke *in an unfavorable light* and that the question [about being recently subjected to medical treatment], was designed to *accord* to Father Meinecke the opportunity to supply an *omitted fact,* which, when supplied, would explain or qualify or excuse or account for his

other testimony in such a way *as to cause the jury to look upon him in a more favorable or less unfavorable light.* In other words, this statement unmistakably implied that the question was intended to enable Father Meinecke *to remove or reduce* a possible or likely *misconception* about him, *arising from his testimony,* which, unless removed or reduced, *would unfavorably reflect upon him;* and which *could be removed or reduced* by a showing that he either had or had not recently been subjected to medical treatment.

In what *possible* way could a showing that Father Meinecke **either had or had not** bodily, as distinguished from mental ills, have explained or qualified or excused or accounted for his other testimony in such a way as to cause the jury to look upon him in a more favorable or less unfavorable light? In what *possible* way could a showing that Father Meinecke **either had or had not bodily,** as distinguished from mental ills, have removed or reduced a possible or likely misconception about him, arising from his testimony, which, unless removed or reduced by such a showing, would unfavorably reflect upon him?

We submit the answer to each of these questions is **"in no possible way."**

In what *possible* way could a showing that Father Meinecke *was* **not** *mentally ill* have explained or qualified or excused or accounted for his other testimony, in such a way as to cause the jury to look upon him in a more favorable or less unfavorable light? In what *possible* way could a showing that Father Mein-

ecke **was not** mentally ill have removed or reduced a possible or likely misconception about him, arising from his testimony, which, unless removed or reduced by such a showing, would unfavorably reflect upon him?

We submit the answers to each of these questions is **"in no possible way."**

There remains but one more alternative. In what *possible* way could a showing that Father Meinecke **was** mentally ill have *explained* or *qualified* or *excused* or *accounted* for his other testimony in such a way as to cause the jury to look upon him in a more favorable or less unfavorable light? In what *possible* way could a showing that Father Meinecke **was** mentally ill have removed or reduced a possible or likely misconception about him, arising from his testimony, which, unless removed or reduced by such a showing, would unfavorably reflect upon him?

The answer to these two questions is not "in no possible way" but is "in *one, and in* **only** *one,* **possible** *way"* namely: If Father Meinecke was shown to be mentally deranged, and particularly if he was shown to be mentally deranged on the particular subject of his testimony, then he was not to be *considered or held to be* **morally responsible** *for the testimony which he had given in favor of the defense.*

This, we assert, is the **only possible way** in which an inquiry concerning either the physical or mental health of Father Meincke **could** have **accorded fairness** to that witness. *in this respect we challenge the*

attorneys for the government to suggest any other possible way, having the least smidgeon of plausibility, in which such an inquiry could have accorded fairness *to Father Meinecke.*

Observe, that if this was the thought which Judge Harris had in mind, then, at this middle stage of the trial, he had made up his mind either (1) that the defendants were guilty of the crimes charged against them or (2) that, whether guilty or innocent, they should (for patriotic reasons) be convicted.

To say this in another way: if this was the thought which Judge Harris had in mind, then he intended, by the quoted question and by his explanation of his purpose in asking it, to tell the jury, in effect, that *if Father Meinecke was not mentally deranged he was culpable—i.e. deserving of blame or censure*—for having given the testimony which he had theretofore given (*in which case his testimony, being that of an evil person, should be disregarded*) whereas *if he were mentally deranged he should be excused for having so testified* (*but in such case his testimony, being that of a person who was mentally irresponsible, should be disregarded.*)

Thus: If this was the thought which Judge Harris had in mind, he was trying, by the asking of the quoted question and by his explanation of his purpose in asking it, *to induce the members of the jury to reject, for one reason or another but definitely to reject, the testimony favorable to the defense which Father Meinecke had given.*

B. But it is not possible that when Judge Harris said: "The question was born and conceived out of a desire on my part to accord fairness to the witness, * * *" he, Judge Harris, was merely "flowing at the mouth," that is, speaking words without reason behind them?

Were this the only instance of this kind we would admit to such a possibility. But this was *not* the *first time* Judge Harris, in his apology to the jury, used the word *"fairness"* with respect to the same witness, and, in the previous instance, the word "fairness" was used in such a way as to imply that a **stigma or onus** *attached to a person who appeared* **voluntarily** as a witness for the defense in the Bridges case, and thus, in that previous instance, Judge Harris *evidenced the* **same** *character of prejudice and prejudicial purpose as that previously outlined by us.*

We have reefrence to the following incident:

The first question which Judge Harris asked Father Meinecke was this:

> "Did you receive a subpoena to attend this court?"
>
> (R. 31.)

The answer was in the affirmative.

Judge Harris in his "apology" stated to the jury his purpose in asking such a question as follows:

> "* * * I think the first question I asked him was whether or not he was subpoenaed. That was overlooked. *I think in fairness to Father Mein-*

ecke it was a question that should have been asked, *showing his purpose in coming here.* * * *"
(R. 37-38.)

In what way *could* the asking of that question have been an act *"in fairness to Father Meinecke"*? In what *conceivable way could* an answer to that question have relieved Father Meinecke of the onus of any thought or inference or suggestion *which would have been* **unfair** *to him*—that is, which if unremoved would have reflected unfavorably upon him?

There is only one *possible plausible* answer to these questions. *And we challenge the attorneys for the Government to suggest any other answer which is in the least bit plausible.* The answer is this: that some onus or stigma attached to a person who came forth **voluntarily** to give testimony favorable to the defendants then on trial, and that by asking Father Meinecke whether he had been subpoenaed, Father Meinecke was given the opportunity, **which in fairness should have been given to him,** *to relieve himself of that onus or stigma by testifying that he was present* **under the compulsion of subpoena.**

Think this over. Examine it from every side and corner and angle and point. And when you are done, no other possible answer containing the least figment of plausibility will have occurred to you.

C. Let us go a step further to show that Judge Harris had Father Meinecke's mental health in mind when he asked the quoted question about recent med-

ical treatment. Consider this part of Judge Harris' apology to the jury:

> "* * * Very many people have to leave large metropolitan areas to go to less burdensome parishes, and that was the reason underlying my question."

Do very many people have to leave large metropolitan areas for less populous communities *to obtain more or better medical care and treatment?* Of course not. The very reverse is the case.

On the other hand, it is a matter of common knowledge that some few people—not *very many,* and not even *just plain many,* but *some few,* who have the means to do so—who suffer from *mental or nervous disorders,* leave, or are sent from large metropolitan areas to less populous communities so that they may there live less exciting lives—lives which are less taxing upon their mental and nervous resources; that is, where they will find a **less burdensome** daily routine.

Before we leave the matter of this sentence of Judge Harris' apology to the jury let it be noted that **clergymen** rather than **parishioners** find **parishes** either **more burdensome** or **less burdensome,** and that, as a result, when Judge Harris said "very many people", he meant either very many clergymen, or, more probably, *very many Roman Catholic priests.* He thus singled out the class to which Father Meinecke belonged, and, in effect, told the jury that **very many**—*not just some, and not just many, but* **very**

many—of the members of that class were mentally ill.*

In other words, in this instance Judge Harris told the jury, in effect, and by unmistakable suggestion and innuendo, that *very many clergymen,* or **very many Catholic priests,** *were of unsound mind,* and that, *in all probability,* **Father Meinecke was one of those very many.** That was the patent suggestion. This was the unmistakable innuendo. *And it impugned the sanity of clergymen, or of Roman Catholic priests, as a class.*

D. Here we find it advisable to retrace a bit in order to explore one of the "side streets" previously mentioned by us. By side streets we mean: matters which, on casual glance, appear to be irrelevant but which, on closer examination, are revealed to be not only relevant but quite material.

As we have hereinbefore shown, Judge Harris, in his apology to the jury, said:

> "* * * The question (concerning having been recently subjected to medical treatment) was born and conceived out of a desire on my part to accord fairness to the witness, *for the reason that mention was made during the course of this testimony that he left San Francisco for Nevada; an inference might be drawn from that departure that it had something to do with activities in*

*Are the facts such as to have warranted a declaration of "judicial knowledge" to this effect? We unhesitatingly assert that they are not.

trade unionism and the like. The Father on the witness stand volunteered that he had asked to be transferred. * * *"

How, by what logical process, **could** it be inferred, from the fact that Father Meinecke had left San Francisco for Nevada, that that *departure* had *something* to do with activities in trade unionism and the like?

In no way. By no logical process.

And in what way could testimony that Father Meinecke *either had or had not* "been *recently subjected to medical treatment*" have *either fortified or lessened, in any degree,* an inference that his departure from San Francisco or to Nevada *either had not or "had something* to do with activities in trade unionism and the like?"

In no way. In absolutely no way.*

Thus, on casual examination, the last quoted statements of Judge Harris appear to be without point or reason, to be *non sequitur,* to be unrelated and irrele-

*Father Meinecke's departure from San Francisco apparently occurred several years prior to February 1, 1950 and in 1946 or 1947 in that he had testified that previous to the last few years he had been in San Francisco (R. 5) and that he came to San Francisco in 1936-37 and remained there approximately ten years. (R. 5 and 6.) He testified on February 1, 1950. Thus medical treatment at or prior to the time of his departure from San Francisco, would not have been *recent*. Moreover, whether Father Meinecke had ever received medical treatment would have had no bearing on whether his departure from San Francisco "had *something* to do with activities in trade unionism and the like".

vant. But let us take a second look, a closer look, a deeper look. *And when we do we will find point and reason and relation and relevance* **aplenty.**

The clue is to be found in the sentence, "The Father on the witness stand *volunteered* that he had asked to be transferred." It is the clue because it points us unerringly to the portion of the record which Judge Harris had in mind, viz.:

"Q. (By Mr. Donohue). Father, are there trade unions up in Eureka, Nevada, where you are now stationed?

A. Unfortunately, the present policy of Washington is that no mining is to be done in the Western United States. Our mines are closed. There are no jobs. My poor little parishes are suffering. So where there are no mines operating, there are no workers, there are no unions.

Q. I was wondering whether there was any reason, after your ten years' experience with the trade union movement, for your being assigned to an area in which there is no trade union movement at all?

A. A very interesting question. No connection whatsoever, and I forgive you for the slur.

Q. I didn't ask for forgiveness, and I meant no slur. I asked you a question. You understand that this is a court of law. (4787)

A. Yes sir. My superiors always gave me loyal backing and approval and urged me to take an interest in the trade union movement and in the problems and knowing these people and being helpful to them. My superiors approved of that fully and gave me full encouragement.

Q. And **it was your superiors who moved you to Eureka, Nevada?**

A. **No, I requested it. The records show that."** (R. 26, 27.)

In view of this testimony, and in the absence of any evidentiary showing to the contrary, [and there was no evidentiary showing to the contrary], there was *absolutely no basis* for an *inference* that Father Meinecke's departure from San Francisco, to Nevada, "had something to do with activities in trade unionism and the like."

It is true, unmistakably true, that Mr. Donohue, by his four questions, tried to **plant** such a thought in the minds of the jury, *not only as being a possibility but as* **being an actuality**. But Mr. Donohue's questions *did not constitute evidence* to serve as basis for an inference such as Judge Harris, in his apology to the jury, said *"might be drawn";* and the evidence, **the only evidence,** on that subject was diametrically opposed to the drawing of such an inference.

Judge Harris, in stating to the jury that such an inference *"might be drawn", in practical effect* **elevated the assertions and suggestions contained in the questions of Mr. Donohue to the level of evidence.** Such statement, in effect, told the jury *that there was evidence before them sufficient to sustain such an inference.* And what was that inference? That Father Meinecke *had been moved* from San Francisco *to Nevada by his superiors because of his "activities in trade unionism and the like."*

E. Now consider this inference, *which Judge Harris told the jury they might draw,* in connection with the suggestion and innuendo of Judge Harris with relation to probable insanity of Father Meinecke, as being parts of **"all the facts** surrounding the Father" with which Judge Harris said **he desired "to provide"** the jury.

What do we find?

We find the suggestion—subtle, it is true, but clearly present—that Father Meinecke was, by his superiors, transferred from San Francisco to Nevada because, *in their judgment,* he had the irrational thought or insane delusion that Harry Bridges and other left-wing labor leaders in San Francisco (which they, the superiors of Father Meinecke, deemed to be Communists or fellow travelers of Communists) were not in fact Communists or fellow travelers of Communists but were only *militant trade unionists.** We find the suggestion that the *superiors of Father Meinecke found him to be* **mentally cracked** *and* **talkative on this one subject** and that they removed him from San Francisco, where he could do great injury (by expressing his opinions on this subject) to the crusade which the Roman Catholic Church was making against Communism and Communists, and **exiled him** to the ghost mining camps, mountains and deserts of Nevada, there to minister to sheep herders and Indians, where his talking about "trade unionism and the like" could do no harm.

*Father Meinecke had testified that in his opinion Bridges was merely a militant trade unionist. (R. 16.)

Be it observed that this explanation of the inference which Judge Harris said "might be drawn" fits in perfectly with and fortifies and furthers the explanation which we have given concerning the way in which inquiry concerning the mental health of Father Meinecke *could accord fairness* to Father Meinecke, and that both of these explanations fit in perfectly with and fortify and further the explanation which we have given concerning the way in which the inquiry as to whether Father Meinecke was subpoenaed *could accord fairness* to Father Meinecke. The course of Judge Harris in these respects *was as consistent as it was persistent, and it was closely knit.* This persistency and consistency and close knitting combine to negative, **as a possible explanation,** the thought that Judge Harris was merely bumbling and stumbling through words the meanings and implications of which he did not comprehend; they combine to negative, **as a possible explanation,** the thought that there was present merely an unfortunate series of slips of either mind or tongue. **Purpose—calculated purpose—is unmistakably revealed.**

F. And what was that purpose? To answer this in the fullness which it deserves we must consider the background.

The Roman Catholic Church is notoriously known to be an implacable and vociferous foe of Communism, Communists, and everything and everyone having a tendency in that direction. The gravamen of the charge against the defendants was that Bridges was a member and active agent of the Communist

Party. Father Meinecke was a Roman Catholic Priest. For ten years he had headed in San Francisco the Association of Catholic Trade Unionists. The Association of Catholic Trade Unionists was an instrument of the Roman Catholic Church organized specifically at the wishes of Pope Pius XI (R. 8) to combat Communism in labor unions (R. 44). Father Meinecke had, during those ten years, been in close contact with Bridges. He had heard the rumors and such that Bridges was a Communist. He had made it his business to investigate that very matter to get the truth of it (R. 14). He had discussed Bridges with many persons who knew him at close range and were not basing their judgments of the man on hearsay and the like. Based on such discussions and his own studied judgment he testified he knew the general reputation of Bridges in San Francisco for truth, honesty and integrity and that it was good. *On cross-examination* it developed that Father Meinecke was of the opinion that Bridges was not a Communist but merely a militant trade unionist (R. 16). In answer to a question *on cross-examination* he testified:

> "Mr. Donohue, *as a Catholic priest, if I had the* **slightest** *notion that Harry Bridges was a Communist,* **I would not be here.** *If I had* **any suspicion whatsoever** *that he was,* **I would not be sitting here or his friend."** (R. 16.)

This testimony of Father Meinecke was like a bomb exploding in the heart of the prosecution's case. *It was like the testimony of a recording angel in favor of a person on trial for a heresy which he denied.*

Unless in some way discredited, **it did great and inestimable damage to the case of the prosecution.**

And what was the **revealed purpose** of Judge Harris? *To discredit that testimony.* **To destroy it in the minds of the jury. To deprive the defendants of its benefit.** And to do so, not by any attack upon the honesty or sincerity of Father Meinecke, but by **telling** *the jury, in effect, that among the facts "surrounding the Father"* which he, Judge Harris, *had a "desire to provide" to them,* **was the fact that Father Meinecke was crazy at least on the one subject, the particular subject, on which he testified;** *and that it was because his superiors had years before discovered that he was crazy on this one subject that he was now stationed in Nevada rather than in San Francisco.*

G. Particular attention should be given to this sentence in Judge Harris' apology to the jury:

> "I merely wanted to inquire, ladies and gentlemen, a very simple question, *not born of curiosity on my part, but born of a desire to provide you with all of the facts surrounding the Father,* and it was to the end that I might inquire as to his health."

The clause "not born of curiosity on my part" in juxtaposition to the clause "but born of a desire on my part to *provide you* with **all** *of the* **facts** *surrounding the Father"* clearly and unmistakably implied that Judge Harris *knew what all of the facts were surrounding the Father and had no reason to be curious.* In other words these two clauses gave to the

suggestion and innuendo of Judge Harris that Father Meinecke was of unsound mind the practical effect *of unsworn but positive testimony of Judge Harris* that Father Meinecke was *in fact,* to Judge Harris' knowledge, *of unsound mind.*

Now let us get back to the Certificate of Judge Harris. We have heretofore said,

> "If by the term 'physical well-being' Judge Harris intended to convey the thought of bodily health, as distinguished from mental health, this recitation in the Certificate is demonstrably false, or, in other words, it is not only not supported by the record but the record, and particularly the record of Judge Harris' own words, proves that it is false."

We think we have shown to the point of demonstration, in the sections which we have designated *First* to *Fifth* and under *Fifth* have lettered A to G, that Judge Harris had Father Meinecke's mental health, as distinguished from his bodily health, in mind when he asked the question about recent medical treatment.

TWO.

Now the question arises: Did Judge Harris make the statement, "directed toward the physical well-being of the witness" in the Certificate with the idea of inferentially denying that the question was directed toward the mental health of Father Meinecke?

Could such declaration in the Certificate have served *any purpose* had it **not** been intended *to point away*

from the question of mental health? **We can think of no such purpose.**

Conversely, if such declaration were intended to point away from the question of mental health, we can think of a very important purpose which such a declaration **could have served.**

The following appears on pages 80 and 81 of the Record:

"(Title of District Court and Cause.)

EXCERPTS FROM THE TESTIMONY IN No. 32117-H

UNITED STATES OF AMERICA VS. HARRY RENTON BRIDGES, HENRY SCHMIDT AND J. R. ROBERTSON.

Before: Hon. George B. Harris, Judge.

Wednesday, December 21, 1949

Paul Crouch

witness for the Government.

Cross-Examination

By Mr. Hallinan:

* * * * * * *

Q. Have you been in any institution for nervous or mental disorders?

Mr. Donohue. Oh, I object, if Your Honor pleases. That is a wholly improper question.

Mr. Hallinan. It is entirely proper to find out of this witness' mental background.

Mr. Donohue. *There is a rule of law,* if Your Honor pleases, *that no witness may be asked any question the answer to which may tend to degrade him. That is the only purpose for which this shot in the dark could be asked of this witness by Mr.*

Hallinan. After all, a witness is entitled to some consideration.

The Court. *The* objection is sustained. (Emphasis added.)

* * * * * * *

Thursday, January 12, 1950.

Lewis Herbert Michener, Jr.,

witness for the Government.

Cross-Examination

by Mr. MacInnis:

Q. Do you know a man named Dr. Ernest Cohen?

A. I believe I do, sir. I do know a doctor by that name.

Q. He is a psychiatrist in Beverly Hills, isn't he?

A. That's correct, sir.

Q. And he has treated you for mental illness in 1944, hasn't he?

Mr. Paisley. Oh, Your Honor——

The Court. The objection is sustained.

* * * * * * *"

(R. 80-81.)

Observe that the Crouch ruling occurred approximately five weeks prior to Father Meinecke's appearance on the witness stand, and that the Michener ruling occurred just over two weeks prior to Father Meinecke's appearance on the witness stand.

From the foregoing, we see that if Judge Harris' question to Father Meinecke about recent medical treatment was directed toward the mental health of

Father Meinecke, *Judge Harris asked that question* **in disregard and defiance of his own previous repeated rulings.** We have hereinbefore shown that Judge Harris' question to Father Meinecke about recent medical treatment was directed toward the mental health of Father Meinecke.

Moreover, that question was asked by Judge Harris not only in disregard and defiance of his own previous repeated rulings, but he was asking that question of **a defense witness** where he had, by such previous rulings, prevented defense counsel, **including appellant,** from asking the same character of question of **prosecution witnesses.**

Nor is this all. Such rulings were to the effect that such a question was improper because **"the answer * * * might tend to degrade" the witness,** and that the *"only purpose for which" such a question* **"could** *be asked" was to obtain an answer which* **would degrade the witness.** We say that this was the effect of those previous rulings because in the first, or Crouch, incident, Judge Harris said **"The** objection is sustained"; because the **only** objection made in that instance *was to the above stated effect;* and, because in the second, or Michener, incident, Judge Harris sustained "the objection" without the "objection" having been stated, *except as it was stated in the Crouch incident.*

Here we need to explore another of the converging avenues to reveal the full effect of such—shall we say—inconsistency on the part of Judge Harris.

On November 22, 1949, during the early stage of the same trial, Judge Harris adjudged Vincent Hallinan guilty of criminal contempt of Court, and sentenced him to six months' imprisonment. (R. 83.)

Said judgment of contempt was appealed to this Court. (R. 84.) This Court affirmed that contempt judgment. (*Hallinan v. U.S.A.*, 182 Fed. (2d) 880.) The criminal contempt in that case consisted of making statements and asking questions assertedly in disregard and defiance of previous rulings of Judge Harris during the trial of the case of *U. S. v. Bridges et al.*

Thus, under the precedent set by Judge Harris in adjudging Vincent Hallinan guilty of contempt of Court (as later sustained by this Court), *Judge Harris was* **himself** *guilty of* **criminal contempt of court** in asking Father Meinecke the question about recent medical treatment if that question was directed toward the *mental health* of Father Meinecke.* As we have seen, that question was so directed.

In other words, if the declaration of Judge Harris in the Certificate that the quoted question to Father Meinecke was "directed toward the physical well-being of the witness" was intended by Judge Harris to point away from the question of mental health, *the purpose which could have been served thereby was to*

*That is, if, in this situation, "sauce for the goose is sauce for the gander". In this respect we say that in our judgment, the responsibility, and therefore in the event of a failure to discharge the responsibility, the culpability, of the judge is greater than that of the advocates.

set up a judicial finding or a pronouncement, **contrary to the truth,** *to prevent appellant from showing,* **in his own defense upon this appeal,** *the fact of misconduct and criminal contempt of court, and the extent of misconduct and criminal contempt of court, of Judge Harris* **in asking the quoted question of Father Meinecke.***

THREE.

Now let us again return to the Certificate of Judge Harris.

Attention is called to the fact that the Certificate does not quote what occurred between the asking of the quoted question by Judge Harris, and the making of the statements by appellant which Judge Harris adjudged to constitute contempt. The omission of such material from the Certificate gives or leaves the suggestion or impression, *if it does not overtly infer,* that appellant's remarks were directed, *and directed solely,* to the asking of the quoted question by Judge Harris.

Such was not the case. Indeed, appellant's remarks were directed more toward something else. *More toward a new and further act of misconduct on the part of Judge Harris than they were toward the asking of the quoted question.* They were directed more to-

*Inasmuch as it was a foregone conclusion that appellant would appeal to this court. Moreover, if such were the purpose of Judge Harris, then declaration was made in the certificate with the intention of thereby deceiving the members of this court and of inducing them to decide the appeal against appellant on an untrue factual basis.

ward certain statements made by Judge Harris between the asking of the quoted question and the quoted remarks of appellant, concerning which statements of Judge Harris the Certificate of Judge Harris makes no mention. This we will presently show.

FOUR.

Before doing so, however, let us pause to point out that even had the remarks of appellant been directed *solely* toward asking of the quoted question, they would have been *entirely justified.*

The would have been justified because the asking of the quoted question constituted misconduct on the part of Judge Harris. Misconduct amounting to criminal contempt of court. *For this, Judge Harris should have cited himself not only for misconduct, but for* criminal contempt of the tribunal over which he was then presiding. For this, Judge Harris should have been ashamed of himself.

FIVE.

But was appellant, at the time he made his remarks, sufficiently aware, from things which had already occurred, of Judge Harris' purpose in asking the quoted question, to give appellant justification for making those remarks?

He was.

A. Appellant knew that the quoted question had relevance only if it had relation to Father Meinecke's *mind* as distinguished from his *body*. Appellant knew

that the quoted question was in *continuation* of the four immediately preceding questions *and that each of those four questions had relation to Father Meinecke's* **mind** *as distinguished from his* **body.** Appellant sensed the implication in the word **"subjected"**, and *knew* from that, that the quoted question had relation to Father Meinecke's **mind** *as distinguished from his* **body.** Appellant **knew** of the previous rulings of Judge Harris in the Crouch and Michener incidents and thus **knew** *that the quoted question was being asked* in **disregard and defiance of those previous rulings.** And appellant **knew** that during the course of the same trial Judge Harris had adjudged Vincent Hallinan **guilty of criminal contempt** of court for having assertedly asked questions *of a prosecution witness* **in disregard and defiance of previous rulings of Judge Harris.**

Here we need to shift to another of the converging avenues.

B. Just as Judge Harris' statement in his apology to the effect that the quoted question was "not born of curiosity on my part, but born of a desire to *provide* you with *all* of the *facts* surrounding the Father" intimated to the jury that Judge Harris had knowledge or information concerning what those facts were, so also the questions which Judge Harris asked Father Meinecke were in such terms and sequence as to convey to the jury (and to all spectators) that Judge Harris was not fishing in the dark or about matters concerning which he had no information but that he

knew what answers should be given, to be truthful, and that those answers, in some way, reflected upon the credibility of Father Meinecke.

The first question—the one about being subpoenaed—by hitting the nail squarely on the head, gave forth such an intimation. Then followed these questions and answers:

Q. Did you arrive here today, Father, this morning?

A. I came in yesterday.

Q. Have you had any discussions before taking your place on the witness stand with any persons?

A. Yes, I spoke to Mr. MacInnis. (4792)

Q. At his office?

A. Not at his office; at his home.

Q. At his home. When did you meet at his home, Father?

A. Last evening.

Q. Did you have dinner there at his home?

A. That is correct, * * *.

(R. 31.)

To all present who heard these questions and answers it became apparent that Judge Harris had foreknowledge (1) that Father Meinecke had arrived in San Francisco the day before, (2) that he had met appellant not at his office but at his home, (3) that he had met appellant in the evening rather than in the daytime, and (4) that he had had dinner in appellant's home. The fact that Judge Harris had elicted these matters so quickly, so unerringly and

with so little lost motion, negatived the thought that he had been fishing in unseen waters.*

Next we come to the series of five questions, hereinbefore set out, about memory, orientation and medical treatment. The very form of the two questions: "In San Francisco, Father, you were perfectly conversant and well oriented, *weren't you,* with respect to dates and the like?," and "Since you went to Nevada your orientation *has* become poor, has it?", indicated that Judge Harris knew that each should be answered in the affirmative, while the injection of the word "oriented" in the one and the word "orientation" in the other contain the same suggestion.

In this connection it should be realized that Judge Harris' departure, *in this one instance,* from his prac-

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*The next question asked by Judge Harris,

"• • • After you *spent the evening there and enjoyed the social activities,* then you had a discussion concerning the testimony that might be given in this case?" (R. 32),

indicated what purpose Judge Harris had in mind in asking this series of questions. It was to show the jury that appellant and Father Meinecke had a relationship other than that of attorney and witness; a *social or fraternal* relationship—a friendship such as Father Meinecke had testified he had with Bridges—and *that, figuratively speaking, Bridges, appellant and Father Meinecke were as three cards out of the same deck, having different faces but the same back, substance and texture. In other words, it was to suggest that Father Meinecke was something less than a free, independent, and responsible witness and that, while the* voice was his, the words were appellant's *and* the testimony was that of Bridges himself.

[As a matter of fact, Father Meinecke performed the marriage of appellant and his wife and baptized each of their three children; and appellant and Bridges were barely acquainted prior to the filing of the indictment. While these facts do not appear of record we deem it permissible to mention them in this footnote to show that there was no basis in fact for the suggestion given forth by Judge Harris by this series of questions.]

tice of *not* cross questioning witnesses (R. 22), was, *in and of itself,* an event charged with the *excitement of anticipation,* the anticipation being that exciting facts, bearing on the credibility of Father Meinecke, *were about to be disclosed.*

This *suggestion of foreknowledge* was insidious in the extreme. It made the quoted question, "Have you been recently subjected to medical treatment, Father?", at once both a *rapier* and a *bludgeon.* A *rapier* if it brought forth an affirmative answer; a *bludgeon* (of unsworn testimony by Judge Harris) if it did not.

This is how appellant regarded that question. This is how appellant was entitled, in reason, to regard that question.

C. Appellant's judgment concerning the purpose of Judge Harris in asking the quoted question finds support in this further circumstance:

The incident in this case—commencing when Father Meinecke began his testimony and ending when Judge Harris concluded his apology to the jury—amounts to approximately *one, two hundred fiftieths* of the trial record of the Bridges case. As the Crouch and Michener rulings indicate, and as anyone with the least bit of acumen would naturally assume, a judge who went so far out in attempting to aid the prosecution and injure the defense as Judge Harris did in this incident was not likely to have displayed strict judicial impartiality throughout the other *two hundred forty-nine, two hundred fiftieths* of the trial. Appel-

lant did not have to make any such assumption. He knew what Judge Harris' conduct had been during the preceding stages of the trial. As a result, appellant did not have to be either clairvoyant or prescient to make a quick and accurate judgment concerning what Judge Harris' purpose was in asking Father Meinecke the question, "Have you been recently subjected to medical treatment, Father?" Appellant would have had to have been completely void of sense and sensibility, and of memory and comprehension, not to have made a quick and accurate judgment concerning that purpose. In this connection it is interesting to note that, to appellant, Judge Harris' apology came as an *anti-climax,* as is clearly indicated by the fact that appellant, in voicing objection to that apology after it was made, could find nothing stronger to say than that it had "the total effect of adding injury to injury" and that "the explanatory remarks are *at least* **partially** *as improper* as the ones originally made." (R. 59.)

We have shown (we believe) to the point where this Court will be entirely satisfied, that even had the remarks of appellant been directed solely toward the asking of the quoted question they would have been *entirely justified,* by the matters *then known* to appellant.

THREE (Continued).

As we have hereinbefore stated, the remarks of appellant were not directed *solely* to the asking of the quoted question but *mainly* to conduct of Judge Harris subsequent to the asking of that question.

Now let us see what occurred between the asking of the quoted question by Judge Harris, and the making of the remarks by appellant which Judge Harris adjudged to constitute contempt. The record in this respect reads as follows:

"Q. Have you been recently subjected to medical treatment, Father?

Mr. Hallinan. If the Court please, I am going to object to these questions.

Mr. MacInnis. Let me in.

Mr. Hallinan. I want to enter a legal objection. Your (4794) Honor has seen the Manning Johnsons, the *Crouches,* the Rosses, and everybody get on that stand and we asked *whether they were insane or not.* I object to your Honor's question. *I object to that last question* and assign that as misconduct, and I ask that the jury be instructed to ignore the implication of *the question.*

The Court. There is no occasion for any admonition to the Jury. *Mr. MacInnis invited it.*

Mr. MacInnis. *I never heard of such a question.*

The Court. *Mr. MacInnis invited me to ask* the *question.*

Mr. MacInnis. Your Honor refused to do that and I asked a question.

The Court. I have the greatest respect for men of the cloth, as we all have.

Mr. MacInnis. You are demonstrating it.

The Court. There is no impropriety in my questioning.

Mr. MacInnis. I say there is.

The Court. He asserted his present memory is not good. I asked him whether or not his

recollection was good while he was here years ago. He said yes, it was good years ago. I don't see any reason for the criticism.

Mr. MacInnis. When one of the prosecution witnesses was on the stand we asked him if he had received medical treatment, and now you ask a priest who comes here and gives testimony the same question. (4795.)

The Court. Ladies and gentlemen——

Mr. MacInnis. I think you should cite yourself for misconduct.

The Court. Ladies and gentlemen——

Mr. MacInnis. I have never heard anything like that. You ought to be ashamed of yourself.

Mr. Donohue. If your Honor please, could I ask your Honor to recess at this time and ask the Father to remain until after the recess period?"*

(R. 33-34.)

It will be observed from the context and sequence of what occurred that appellant's remarks were directed more to the statement of Judge Harris that appellant had invited Judge Harris to ask the quoted question than they were to the asking of that question. The following two statements of appellant reveal that this is so. "I have never heard of such a question," and "I have never heard anything like that."

*By this "timely" motion for a recess, Mr. Donohue revealed that he realized that, in the exchange with appellant, Judge Harris was getting himself farther and farther out on a limb and that appellant was sawing deeper and deeper into that limb where it joined the trunk.

The statement of Judge Harris that appellant had invited him to ask "the question" was **absolutely false.** *Even worse still:* although absolutely false, *the circumstances were such that, in all probability, it appeared to the jury to be a truthful statement.*

Here it becomes necessary for us to explore another of the converging avenues.

At one point during the examination of Father Meinecke, Mr. Donohue, the Chief Prosecutor, moved the Court to strike the testimony of the priest on the ground that his testimony concerned his own personal opinion of Bridges, and not the general reputation of Bridges, *and hence was legally inadmissible.* In replying to that motion, appellant made this statement:

> "* * * I will invite your Honor to ask the witness if the answer he gives is not a composite of his own knowledge of the man plus what other people in the community have said."* (R. 21.)

That was the *only invitation* extended by appellant to Judge Harris to question Father Meinecke.

Judge Harris replied to this invitation as follows: "Mr. MacInnis, you are counsel for several of the defendants. You may ask him that if you are so advised." (R. 21.) " * * It is not tht province of the court to examine the witness. You ask the questions if you like." (R. 22.) It is revealingly interesting to observe that when invited by appellant to ask this question, the asking of which by Judge Harris would have been of benefit to the defense, Judge Harris refused, but as soon as Mr. Donohue said: "I have no further questions of the witness", Judge Harris said: "One question, Father Meinecke" (R. 31) and then proceeded to question the priest on behalf of the prosecution in the way hereinbefore exposed.

It was **not** an invitation to question Father Meinecke *about his health,* **whether physical or mental.** It was **not** even an invitation to question Father Meinecke **generally.** It was an invitation to put a single question to Father Meinecke on a limited, specific, defined subject *which had no relation to the subject of Father Meinecke's bodily or mental health.*

In all probability, the jury remembered the incident of this invitation, but did not remember, or even at the time the invitation was extended did not realize, that it was limited to a single specific defined subject matter. It is for this reason that we say that the circumstances were such that, in all probability, the statement of Judge Harris that appellant had invited the quoted question about recent medical treatment *appeared to the jury to be a truthful statement, whereas, as a matter of record fact, it was absolutely false.*

Now let us ask why Judge Harris found it necessary or convenient to declare in the presence of the jury that appellant had invited the question. We think the reason and the purpose of Judge Harris in this respect is unmistakably apparent, viz: (1) Judge Harris knew that by his previous rulings he had repeatedly prevented counsel for the defense from questioning prosecution witnesses concerning possible mental illness; (2) Judge Harris realized that in all probability the jury remembered that he had made such rulings; (3) The objection of Vincent Hallinan just then made recalled such rulings

to the jury's attention; (4) Thus Judge Harris found himself in an extremely embarrassing position with respect to the jury, that is, in the position of himself having asked a defense witness a question of a character which he had theretofore repeatedly held to be improper when asked of prosecution witnesses; and (5) **That Judge Harris made the statement that appellant had invited the question in an attempt and for the purpose of saving his own face with the jury, that is, in an attempt to conceal from the jury the fact that he had asked the quoted question in disregard and defiance of his own previous ruling.**

Is there any other possible explanation which is in the least bit plausible? We can think of none. *And, again, we challenge the attorneys for the Government to suggest such an explanation if they can so much as imagine one.*

When Judge Harris declared that appellant had invited the question, he knew that that declaration was false. No matter how faulty his memory, Judge Harris could not have been mistaken in this respect. His memory might possibly have slipped a cog to the extent of remembering appellant's invitation as being an invitation to question Father Meinecke generally, but it could not have stripped its gears completely, that is, to the extent of remembering appellant's invitation as being one *to ask the Father about his mental or physical well-being.*

And note this: Judge Harris first said "Mr. MacInnis invited it"; appellant then said *"I never heard of* such a question"; and Judge Harris then in response to appellant's specific disavowal, declared:

"Mr. MacInnis invited me to ask the *question."*

"* * * the *question"*.

Not *"questions."* Not *"a question."* but

"* * * the *question"*.

SIX.

What was appellant to think when suddenly confronted with this falsehood, coupled with this attempt to shift the blame from Judge Harris, on whom it belonged, to and upon appellant, upon whom it did not belong?

What was appellant to do? What was he to say in an attempt both to save the record and to reveal to the jury that such declaration and accusation by Judge Harris was untrue? What was appellant to do to save both the record for appeal and at the same time to save his clients from the injury which they would suffer in the minds of the jury should such falsehood and false accusation go unchallenged?

Appellant had no time to study the matter. He had no time to reflect, or to analyze, or to deliberate, or to choose carefully his words. He had to act immediately. He had to grasp and utter the thoughts and words which first came into his mind. He had to repel at once this flank attack—indeed, he had to

repel at once this two pronged stiletto attack from his rear.

That Judge Harris should have cited himself for misconduct for attempting to foist this falsehood upon the jury is manifest. That he should have been ashamed of himself for so doing is also and equally manifest. His act was that of an unfair judge covertly acting as a prosecutor. His act was that of attempting to influence the jury against the defendants, and thereby procure their conviction, and then, when his devious design was about to be exposed, of foisting a deliberate falsehood upon the jury in an attempt to block and smother such a disclosure. We repeat, Judge Harris should have cited himself for misconduct. Indeed, he should have cited himself for criminal contempt of Court. And he should have been ashamed of himself.

SEVEN.

But should appellant have declared these two things in the presence of the jury? Should he have been content to make merely a formal assignment of misconduct to preserve the record for appeal, thereby permitting the nefarious purpose of Judge Harris to succeed? Or should appellant have attempted, as he did attempt, albeit ineffectively, to prevent the weight of the District Court of the United States from being thrown into the scales of justice against the defendants to procure their conviction at the hands of the jury?

Cooley in his work on Constitutional Limitations, Eighth Edition, in the chapter on Protection To Personal Liberty, says, on page 703:

> "Having once engaged in a cause, the counsel is not afterwards at liberty to withdraw from it without the consent of his client and of the court; and even though he may be impressed with a belief in his client's guilt, it will nevertheless be his duty to see that a conviction is not secured contrary to the law. The worst criminal is entitled to be judged by the laws; and if his conviction is secured by a means of a perversion of the law, the injury to the cause of public justice will be more serious and lasting in its results than his being allowed to escape altogether."

To such text there is added this footnote:

> "There may be cases in which it will become the duty of counsel to interpose between the court and the accused, and fearlessly to brave all consequences personal to himself, where it appears to him that in no other mode can the law be vindicated and justice done to his client; but these cases are so rare, that doubtless they will stand out in judicial history as notable exceptions to the ready obedience which the bar should yield to the authority of the court."

The footnote continues much beyond the point which we have quoted, setting forth an example of justifiable defiance of Court by counsel, by Lord Erskine, the famous English barrister, and making reference to a similar justifiable defiance of Court by counsel, by Mr. Samuel Dexter, the celebrated Ameri-

can counsel, as set forth in Story on the Constitution (4th Ed.) p. 1064. But we have quoted enough from Cooley to make our point. It is this: **if ever there were an instance where it became "the duty of counsel to interpose between the court and the accused, and fearlessly to brave all consequences personal to himself, where it appears to him that in no other mode can the law be vindicated and justice done to his client", such an instance was present in this case in this instance.**

Appellant attempted to discharge precisely that duty. It is true that he did so more with courage than effect. It is true that in appellant's hurried statements he *accused* Judge Harris rather than *revealed* Judge Harris' fault. Perhaps, had the exchange between Judge Harris and appellant not been interrupted so quickly by Mr. Donohue's motion for a recess **(which was grasped with great alacrity by Judge Harris)**, appellant would have succeeded in passing from accusation to revelation.*

It is because, and solely because appellant rightfully and properly attempted to discharge this duty, that he was adjudged guilty of criminal contempt of court, and was sentenced to three months in prison.

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*It so happens that appellant's statements did have effect in so far as preserving a record on appeal in the *Bridges* case was concerned, for his statements had the effect of inducing Judge Harris to make an apology to the jury, in which apology he unmistakably revealed nefarious purposes which this Court would not have attributed to any U. S. District Judge, in the absence of such a disclosure of such purposes as Judge Harris made in his apology to the jury.

The punishment is being visited upon appellant not because of any wrongdoing on his part, but because he had the courage to attempt immediately to expose the wrongdoing of Judge Harris so that his clients should not be wrongfully and unfairly convicted.

EIGHT.

Before concluding our argument on this point, we wish to make a personal statement. We regret that we have found it necessary to say the things which we have said against one who occupies one of the highest offices in the Government of our nation. We would not have said such things (in this tribunal as distinguished from the tribunals in which impeachments of Federal officers are brought and tried) had we not thought it necessary for us to do so to adequately present the defense which appellant has. Nor would we have made the charges which we have made had there been any vestige of doubt in our mind on either of two things, viz: (1) that the charges were in fact true, and (2) that their truth clearly and unmistakably appeared in the record.

Our task has been an unpleasant one. And it has been a difficult one in that we have redrafted the foregoing argument time after time, in an attempt to be moderate without weakening appellant's defense. But the more we labored, the more we came to the conviction that the argument which we have made should be made in order to make crystal clear and diamond sharp the fact, the nature, and the

extent of appellant's justification. We regret we present such issue for this Court's consideration and determination. But that issue has not been of our making; it was presented to us by Judge Harris. We have had no alternative but to face it and to pass it along to this Court.

To state this matter in another way: we find ourselves in the position of a physician who, in order to save his patient, must cut open, and probe, and excise, a foul and festering wound inflicted upon him by another. We have performed such an operation in this brief, not because we have found it pleasant to do so, but because we have found it necessary and our duty to do so.

It is not our desire to give offense or to be offensive. It is our purpose to defend—to present the defense which appellant has—and to do so as forcefully and as convincing as lies within our skill, employing only the ammunition which Judge Harris has placed within our reach.

NINE.

In concluding our argument on this point, permit us to express our conviction that appellant is entitled not only to a reversal of the judgment and sentence but to vindication, and that vindication will not be his if the judgment and sentence are reversed solely on one or more points of jurisdiction and procedure. Calumny is difficult to combat and it has a propensity to grow and increase until it is turned back upon itself; aye, even after it is turned back upon itself.

Appellant has suffered, in his practice and in his social relations and in other ways, as a result of the calumny placed upon him by the present judgment. He is entitled, in fairness and justice, to all the relief which this Court can give him. He is entitled to a decision in which his justification is fully stated.

Appendix B

No. 12,599

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES MARTIN MACINNIS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

REPLY BRIEF FOR APPELLANT.

The most noteworthy fact about the brief for Appellee is that, except for unsubstantiated general denials and castigating denunciations, *nowhere* therein is *any* attempt made to refute, or to answer, or to explain away, or to lessen the logical impact of, *any* of the factual statements, or *any* of the factual analyses, or *any* of the factual deductions contained in the opening brief for Appellant under Appellant's First Point, pages 10 to 55 inclusive.

This is so notwithstanding the fact that three times in that argument Appellee was explicitly challenged to suggest explanations, other than the ones made by Appellant, which were in the least bit plausible (OBFA 10-20, 22 and 48) and notwithstanding the

further and more important fact that the whole of the argument under Appellant's First Point is of such a character as not only to *challenge* refutation but to *defy* refutation.

The fact that no attempt has been made by Appellee to refute such argument, or even to find flaws in it, indicates, and we think quite conclusively, that, despite its unsubstantiated general denials and castigating denunciations, Appellee has found that argument to be unassailably correct, not only as a whole but in each of its parts.

While not attempting to refute or answer that argument, Appellee has taken, or pretended to take, certain positions with respect to it. We now proceed to examine such positions, to the extent that the page limitation of Rule 20, Section 2, subdivision (f) will permit.

On page 15 of its brief Appellee says:

> It is not necessary on this appeal to defend the presiding judge's conduct in the Bridges trial against the attacks of appellant MacInnis. While it is strenuously asserted that Judge Harris' conduct toward the defendants on trial and toward their counsel was eminently tolerant, fair and impartial, that conduct is a matter for review by this Court upon an appeal on the merits of the *Bridges* case. The propriety of appellant's behavior, not that of the Court, is now the issue.

The *strenuousness* of Appellee's *assertion* with respect to the propriety of the conduct of Judge Harris is one *of words only:* words without stated reason in substantiation thereof. More accurately, that *strenuousness* finds its *entire existence and vitality* in the *use* of the *one* word *"strenuously"*. The strength is verbal, not logical or even rational.

By what rationale could Appellee reach the conclusion and assert that the conduct of Judge Harris, in asking a defense witness a question of a character which Judge Harris, during the same trial, had repeatedly held to be improper when asked of prosecution witnesses (compare record 80 and 81 with the record 33 and OBFA 32 to 37) was "eminently * * * impartial"? By what rationale could Appellee reach the conclusion and assert that the conduct of Judge Harris in twice falsely stating in the presence of the jury that Appellant had invited Judge Harris to ask the question the second time immediately following Appellant's truthful disavowal (see record 33 and OBFA 43 to 49) thereby, in effect, *falsely* accusing Appellant of *lying* and of trying to deceive the jury, was "eminently * * * fair"?

Either Appellee made these *strenuous assertions* without giving real consideration to the conduct of Judge Harris, or in crass stupidity, or in cynical disregard of the truth and this Court's perspicacity.

It is true that the propriety of the conduct of Judge Harris in the respects set forth in the opening brief for Appellant "is a matter for review by this Court on an appeal on the merits in the *Bridges* case." But this is so *not* because the propriety of that conduct will be *the major issue, or even one of the major issues,* on that appeal, i.e. the *ultimate point, or one of the ultimate points,* for decision on that appeal. It is so because the propriety of that conduct will be a *minor issue* on that appeal, that is, because it will have *material relation* to *one* of the *major issues* on that appeal, namely: to the issue of whether the *judgments* in that case have the *legal infamity* of *prejudicial error* committed during the course of the trial which produced *those judgments.*

But it is not true, as intimated by Appellee, that because the propriety of such conduct will be "a matter for review by this Court on an appeal on the merits in the *Bridges* case" that it is not a matter for review *on this appeal.* On the contrary, the propriety of such conduct of Judge Harris is a matter for review on this appeal for *identically* the same reason that it will be a matter for review in the *Bridges* case, namely: because in this case, as in the *Bridges* case, it is a *minor issue,* that is: an issue having *material relation* to *one* of the *major issues.* In this case it has *material relation* to the *major issue* of whether the remarks of appellant *adjudged to be contemptuous were in fact contemptuous;* that is: whether the circumstances *existing* at the time they were uttered—including (1) the matters to which they were addressed, (2) Appellant's understanding with respect to those matters and (3) Appellant's purpose in making those remarks—did or did not *justify or excuse* Appellant in making those remarks.

In this respect, the statement of Mr. Justice Holmes in his dissenting opinion in *Toledo Newspaper Co. v. U. S.,* 247 U.S. 402, 423 (which opinion was later adopted by reference in the majority opinion in *Nye v. U. S.,* 313 U.S. 33, 52) that:

> "Misbehavior means something more than adverse comment or disrespect."

should be borne in mind, as should the Supreme Court's statement in *Gompers v. Bucks Stove & R. Co.,* 122 U.S. 418, 444, that:

> "* * * in proceedings for criminal contempt the defendant is presumed to be innocent," and "he must be proved guilty beyond a reasonable doubt, * * *."

See also *Boyd v. U. S.,* 116 U.S. 616.

The matters to which the remarks of Appellant were addressed included the two statements made by Judge Harris less than a minute previously, namely: "Mr. MacInnis invited it" and "Mr. MacInnis invited me to ask the question." They also included the statement made by Appellant between those two statements made by Judge Harris, namely: "I never heard of such a question."

As we hereinbefore pointed out, Judge Harris' statement "Mr. MacInnis invited me to ask the question" following, as it did, Appellant's statement that he had "never heard of such a question", in effect, *accused* Appellant of having *lied* when he made that statement. And, as that second statement of Judge Harris was made in the presence of the jury, it had the effect not only of accusing Appellant of lying *but also of telling the jury that Appellant was trying to deceive them.*

Had the two statements of Judge Harris been true, there could be no question but that the subsequent statements of Appellant, viz., "I think you should cite yourself for misconduct. I never heard anything like that. You should be ashamed of yourself", *in so far as they had reference to those two statements of Judge Harris,* would have constituted contempt.

But, as we have shown, those two statements of Judge Harris were absolutely false (OBFA 46, 47) and Judge Harris, at least after Appellant's intervening statement of disavowal, *must* have *known and realized* that they were false (OBFA 48, 49).

These things being so, Judge Harris' statement "Mr. MacInnis invited me to ask the question",

unquestionably constituted misconduct.* And not only misconduct but wilful misconduct of the most atrocious sort. Misconduct of the most atrocious sort in that, by telling the jury that Appellant was lying (when Appellant was in fact telling the truth), it had an irresistible tendency completely to discredit Appellant in the minds of the jury and thereby wrongfully and unconstitutionally deprive the defendants of Appellant's effective services as counsel and to make of Appellant a positive liability to those defendants. (See *Glasser v. U. S.*, 315 U.S. 60.)

Moreover, as "the Court" during the trial of a criminal case consists of "the judge" and "the jury", the wilfully false statements of Judge Harris in the presence of the jury were calculated to deceive that part of "the Court" which is "the jury" and thus to deceive "the Court" itself. This being so, such wilfully false statements constituted not only misconduct but misconduct amounting to criminal contempt of Court. (See *U. S. v. Ford*, 9 Fed. (2d) 990, cited by Appellee on pages 13 and 16 of its brief.)

Appellee contends that even if "the conduct *and rulings*" of Judge Harris "were erroneous Appellant had an adequate remedy of appeal" in the *Bridges* case "and was not thereby licensed belligerently to assail the authority and dignity of the Court and bring it into public disrepute". (BFA 11.)

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*See this Court's decision in *Williams v. U.S.*, 93 Fed. (2d) 685, and the cases therein cited and quoted from, including:

Adler v. U. S., 182 F. 464, 472, 473;
Fronts v. U. S., 62 F. (2d) 737, 739;
Hunter v. U. S., 62 F. (2d) 217, 220, and
Quercia v. U. S., 289 U.S. 466, 470, 472.

These cases also reveal beyond question that Judge Harris was guilty of misconduct in his examination of Father Meinecke and particularly in his asking Father Meinecke the question "Have you been recently subjected to medical treatment, Father?"

First let it be observed that no *rulings* of Judge Harris were assailed by Appellant. The asking of the question by Judge Harris did not constitute a *ruling*. The statement "Mr. MacInnis invited it" did not constitute a *ruling*. Nor did the statement "Mr. MacInnis invited me to ask the question" constitute a *ruling*. Only *acts of conduct* of Judge Harris, as distinguished from the *rulings* of Judge Harris, were *in any wise* assailed by Appellant. For this reason the cases cited by Appellee on pages 16 to 19 of its brief are not in point for they all involved the disregard of rulings or the making of demonstrations against rulings.

It is true that it is the duty of counsel, during the course of a trial to abide by the rulings of the Court and not to disregard or defy or protest or assail those rulings, but to wait to have them corrected on appeal, if erroneous.

But this rule *does not apply* to *acts of misconduct* by the judge of the Court. The right to protest, *and to openly charge that they are acts of misconduct, using that very word*, exists. Indeed, the duty to *assign such acts as misconduct* (in order to accord the Court an opportunity to undo the harm by proper admonitions), as a predicate for a claim of error on appeal, exists, although, in some instances, where to make such an assignment would increase rather than diminish the harm and prejudice, Appellate Courts have held that the lack of such an assignment of misconduct would not *foreclose* the raising of the point of misconduct on appeal. (See this Court's decision in *Williams v. U. S.*, supra, and cases therein cited.)

Had Appellant said to Judge Harris: "I assign your statements 'Mr. MacInnis invited it', and 'Mr.

MacInnis invited me to ask the question' as misconduct in this: that those statements are false in fact and that they, in effect, accuse me of having lied, and with having attempted to deceive the jury, when I truthfully stated that I had not heard of such a question; and I request that you inform the jury that those two statements of yours are untrue and that my statement is true" * * * had Appellant made such a statement to Judge Harris *he would have been entirely within his rights,* although such statement, being more pointed, and openly accusing Judge Harris of a twice stated falsehood, would have been much more offensive than the statements which Appellant did make, and would have brought Judge Harris much more certainly and much more quickly into "public disrepute".

Appellant's statement "I think you should cite yourself for misconduct", in effect, assigned the two statements of Judge Harris to be misconduct and requested that he undo the wrong by retracting those statements, in that an assignment of misconduct *by* Judge Harris would have been an admission of misconduct. Appellant's statement "I never heard of such a thing", being a repetition, in slightly different words, of his previous statement, "I never heard of such a question", clearly revealed that Appellant was making reference to the two statements of Judge Harris that Appellant had invited Judge Harris to ask the question. (The statement "I never heard of such a thing" is meaningless, without point or purpose, a *non sequitur,* unless such was its direction.) Appellant's statement "You should be ashamed of yourself" merely voiced Appellant's *righteous indignation* of having been falsely accused by Judge Harris, in the presence of the jury, of having lied

when he said that he had never heard of such a question.

Certainly Appellant, under these circumstances, had the right to make *some* form of *personal protest*, and, in that personal protest, to voice a measure of indignation. Appellant had been *personally* assailed by Judge Harris. His *personal* veracity, his *personal* integrity, had been *falsely impugned* by Judge Harris. Yet Appellee takes the position that all of this could have been corrected on an appeal in the *Bridges* case and that it was Appellant's duty, as an officer of the Court, to bow to, to acquiesce in, to accede to, this twice-stated falsehood of Judge Harris and to *ignore*, and, *by ignoring to appear to accept as deserved*, the *personal assault* which Judge Harris had made *upon Appellant's veracity and integrity*.

The law recognizes the right of self defense even in homicide cases. Does it make an exception where the one making the assault is a judge, and the one assaulted is an attorney in the trial of a case before that judge, and the assault is not only without provocation but is wilfully wrong and, unless resisted, inescapably injurious?

According to Appellee, the law does make such an exception. According to Appellee the more unprovoked such an assault is and the more wilfully wrong it happens to be, and the more damaging its result if unopposed, the more the attorney is duty bound *not to defend himself* because of the greater probability that the making of a defense, thereby exposing the wrong doing of the judge, will bring the Court "into public disrepute". Indeed, Appellee goes so far as to contend (BFA 16) that it is an attorney's "*paramount* obligation" to shield the judge under such

circumstances. "Paramount" means "superior to all others". Thus, Appellee contends that an attorney's obligation to shield the judge from criticism is superior to his obligation to himself, to his clients, to the cause of justice and to the law. Either this is Appellee's contention or Appellee is ignorant of the meaning of the word paramount.

Appellee would have this Court weigh the remarks of Appellant divorced from, indeed, *torn from,* their setting in the record. Appellee would have this Court consider those remarks without relation to the matters to which they were addressed and without regard to whether they were or were not in fact either justified or excused by what had preceded their utterance. Appellee would have this Court deny to Appellant the right to make a factual defense, *based upon the record,* although the judgment against him was issued without notice or hearing or any opportunity, prior to the issuance of that judgment, to make any showing or explanation or argument in defense or justification or excuse of his conduct.

But this is by no means the limit to which Appellee would have this Court go in order to sustain the judgment against Appellant. Appellee would not only have this Court consider the remarks of Appellant torn from their setting in the record but it would have this Court consider those remarks in the framework, and, as we shall show, the false and misleading framework, put around them by Judge Harris in the certificate which forms a part of the judgment.

On pages 12 and 13 of its brief Appellee makes this statement:

> "In appraising appellant's behavior as described in the Court's certificate, consideration should be given not only to the language used by appel-

lant but also to Judge Harris' description of appellant's contemptuous demeanor, i.e., that he 'jumped to his feet, participated in a critical remonstrance of the Court' and that he addressed himself to the Court 'in a belligerent manner in the presence of the jury'."

And later on page 13 Appellee says:

"The insolent language used by appellant MacInnis in addressing the presiding judge, *coupled with appellant's belligerent manner,* unquestionably implied a purpose to flout the authority and dignity of the Court and to intimidate it in its administration of the law." (Emphasis added.)

In the opening brief pages 11 to 32 and 37, 38, 43 to 49 we pointed out that the certificate of Judge Harris was misleading both in certain of its declarations and by reason of certain material omissions. Such misleading items in the certificate would seem to cast doubt on its accuracy in other respects as well. Moreover, the characterizations of Appellant's demeanor to which Appellee calls attention *serve as a fill in where those material omissions occur.* This circumstance, again, would seem to cast doubt on the accuracy of those characterizations.

Let us now examine the three characterizations of Appellant's demeanor made by Judge Harris, and see to what extent they hold up under inspection.

The first is:

"Following such question, Mr. MacInnis jumped to his feet, * * *"

The expression "jumped to his feet" is what is known as an *hyberbole,* that is "a poetic or rhetorical *overstatement;* an *exaggeration*". The *un*exaggerated meaning is that appellant rapidly arose from a sitting

to a standing position. That is a characteristic movement of an attorney seeking to interpose an objection to a question which calls for a "yes" or "no" answer which, to be effective, must be interposed before the question is answered. *The question to which Appellant wished to object called for such an answer.*

Moreover, the record discloses that Vincent Hallinan was first to arise and start speaking and that Appellant did not address the Court until *after* (1) Mr. Hallinan had said seventy-seven words divided into five sentences *and* (2) Judge Harris had said fourteen words divided into two sentences and (3) Judge Harris said "Mr. MacInnis invited it." Consequently, the record makes indisputedly clear that there was no *precipitate* action by Appellant, such as is implied by Judge Harris in the declaration "Following such question, Mr. MacInnis jumped to his feet." In other words, such characterization of Appellant's demeanor is not only an exaggeration *but is a gross exaggeration.*

If Judge Harris would grossly exaggerate in this formal instance, *where any degree of exaggeration is wholly out of place and, literally, prejudicial,* is it not reasonable to assume that the companion declarations of Judge Harris are likewise and equally gross exaggerations? Where does exaggeration stop once it has started? And where there is a disposition to exaggerate is any statement to be taken without a liberal sprinkling of salt?

The next characterization, divided from "jumped to his feet" by no more than a comma, is this

> "participated in a critical remonstrance of the Court, * * *"

Participate means: "to have or enjoy a *share in common with others*".

Only Appellant and Vincent Hallinan spoke to the Court. Thus, by the word *participated,* Judge Harris characterized what Vincent Hallinan said, as well as what Appellant said, as being a "critical remonstrance of the Court." Mr. Hallinan said:

> "If the Court please, I am going to object to these questions. * * * I want to enter a legal objection. Your Honor has seen the Manning Johnsons, the Crouches, the Rosses and everybody get on that stand and we asked whether they were insane or not. I object to your Honor's question. I object to that last question and assign that as misconduct, and I ask that the jury be instructed to ignore the implication of the question."

Every word of this statement was proper and courteous. Again Judge Harris exaggerated. Grossly exaggerated.

Appellant's first remark to the Court was "I never heard of such a question." That was an oblique rather than a direct contradiction of Judge Harris' statement "Mr. MacInnis invited it". Being an oblique contradiction, it not only accorded Judge Harris an opportunity to retreat from falsehood to truth *but to do so with face-saving grace.*

Instead of retreating Judge Harris forged ahead, not only repeating the falsehood but repeating it under circumstances which made it an attack on Appellant's integrity. Did Appellant then commence a "critical remonstrance of the Court?" He did not. He again gave a *soft* answer, that is an answer which still left the way open for Judge Harris to retreat gracefully from falsehood to truth. What Appellant said was: *"Your Honor* refused to do that and I asked a question." The phrase "Your Honor" connoted respect, not disrespect, and the remaining

portion of the statement was anything but a critical remonstrance. It was only *after* Judge Harris shifted away from the question of whether Appellant had or had not invited Judge Harris to ask the question that Appellant's statements began to be stiffened and pointed.

This sequence of events did not indicate a disposition on the part of Appellant to engage in a "critical remonstrance of the Court". It indicated a disposition to conciliate Judge Harris, that is, by suggestion, to induce Judge Harris, without loss of face, to undo the wrong and the harm which he had just done. Thus we see that, also as applied to appellant, the characterization of "critical remonstrances of the Court" is an exaggeration. A gross exaggeration.

And the same thing is true in the case of the phrase "in a belligerent manner". Belligerent means warlike, pugnacious. It connotes a disposition to pick *and press* a fight. The record shows that after Appellant said the *twenty-two words* which Judge Harris adjudged to be contemptuous Appellant remained silent for over two transcript pages at which point a recess was taken without comment by Appellant.

There was nothing warlike about this. There was no continuing burst of machine gun fire or banzai charge. What Judge Harris should have certified was that Appellant addressed the Court in an "indignant manner". There is a vast difference between an *indignant manner* and a *belligerent manner*. And we freely concede that some *slight* measure of Appellant's *righteous indignation* crept into his tone of voice and facial expression as well as into his words. After all, Appellant is a human being and has the normal human sensibilities and emotional reflexes.

Thus we see that the framework which Judge Harris has put around the remarks of Appellant is a false and misleading framework.

As we hereinbefore said "Appellee would not only have this Court consider the remarks of Appellent torn from their setting in the record but would have this Court consider those remarks in the 'false and misleading' framework * * * put around them by Judge Harris in the Certificate which forms a part of the judgment." We do not believe that this Court will resort, or will be in the least bit tempted to resort, to such legalistic legerdemain, to such legalistic "now you do not see what is in fact present and now you do see what in fact is not present", to sustain the judgment against Appellant.

We have dealt with the unsubstantiated general denials of Appellee. Let us now deal with the unsubstantiated castigating denunciations. On page 13 of its brief Appellee says:

> "* * * appellant proceeds to devote the bulk of his brief to a reiteration and amplification of his original contemptuous remarks, * * *"

And further on page 13 Appellee says:

> "By a tortuous process of specious reasoning, including strained interpretations of events occurring after the commission of the contempt, hypercritical definitions of the meanings of some of the words and phrases used by the trial judge, inferences based upon inferences, and claimed innuendo hidden in the Court's innocent language, appellant purports to construct a factual basis for his charge that the presiding judge was prejudiced against the defendants in the Bridges case and sought to secure their convictions (Br. 10-55)."

Is it not strange, if all of these things are so, that Appellee is unable to point to so much as a single instance in substantiation of any one of them?

Actually such denunciations amount to little more than the calling of names for, except as to one instance, they give us nothing to answer except to say "We did not" in response to Appellee's "you did so." The one instance is the clause "hypercritical definitions of words and phrases used by the trial Judge." Definitions, whether hypercritical or not, can be identified and counted.

Between pages 10 and 55 of our opening brief (cited by Appellee) we attempted but *one* definition, that of the word "subjected" on page 15. The plural *s* to definition*s* is, thus, unadulterated wind used to blow up definition into definitions.

In that one definition we cited a standard dictionary giving all five of the clauses with which that word is defined. If this was a "*hypercritical* definition", then *all* dictionary definitions are *hypercritical*.

Appellee would have this Court hold, or infer, that Judge Harris meant something *other* than "subjected" when he used that word. But what? Appellee gives us no clue. And Appellee would have this Court infer that the jurors understood the meaning which Judge Harris intended. Again, what meaning? And Appellee would have this Court hold that appellant was being *hypercritical* in assuming that Judge Harris used the word "subjected" in its dictionary meaning. We are reminded of the conversation between Alice and Humpty Dumpty in *"Through the Looking Glass"* where Humpty Dumpty said:

> "When *I* use a word * * * it means just what I choose it to mean—neither more nor less. * * *

> The question is * * * which is to be master (the word or I) * * * When I make a word do a lot of work like that * * * I aways pay it extra."

The castigating denunciations reach their apex on pages 29 and 30 of Appellee's Brief where it is said:

> "We believe the following language in *Sachs v. Government of the Canal Zone,* 176 F. (2d) 293, 300 (C.A. 5), cert. den. 338 U.S. 858, used in affirming a sentence for criminal libel, *is singularly applicable to appellant's entire brief** in the subject case:
>
> " 'In his attack upon the sentence, as distinguished from the conviction, the brief carries forward the same bitterness of attack, the same venom and anger, against the District Attorney. It does not put forward, as mitigating the offense, that appellant was acting in the heat of anger. He made no effort below, he makes none here, to apologize for his libelous charges or to explain them away on this ground. He made the attack in bitterness and resentment. He has continued it the same way. Complaining here of the sentence as unduly severe and asking its correction, he does not do so as an erring person convinced of his error and bringing forth fruits meant for repentance, but in anger and resentment. His brief states that he is a college graduate, a naval veteran, and that he has no previous record of crime. These facts show that he is not an underprivileged, illiterate and misled person, offending through ignorance, but a thoroughly informed one, who has knowingly offended and repents not. They make against him rather than for him when, with a vigorous determination to fight the matter out to the end in self-righteousness and as an accuser, he demands a reduction of his sentence instead of confessing his guilt and suing in repentance for a mitigation of its punishment.' "

*This emphasis ours.

What Appellee does not point out is that on the jury trial for criminal libel Sachs not only had the opportunity to put on evidence to prove that the libelous remarks were true and were published in good faith but that, after proof of the publication of those remarks by Sachs, the burden was upon Sachs to so prove in order to escape criminal responsibility, *and that Sachs offered no such evidence on such trial or on the subsequent presentence trial, when he again had the opportunity to offer evidence to prove such things.*

In this case, on the contrary, Appellant has had no trial, no opportunity to defend himself or explain his conduct, prior to or separate from this appeal, and all of his factual defense, except the Crouch and Michener incidents, is based upon that portion of the record in the *Bridges* case *which Judge Harris annexed to and made a part of the Certificate,* and the Crouch and Michener incidents are parts of the Bridges trial record, containing previous inconsistent rulings of Judge Harris, which are certified by the Clerk of the United States District Court.

These things being so, how could what the Court of Appeals said in the *Sachs* case, as quoted by Appellee, be "singularly applicable to Appellant's entire brief" in this case or *in any way or degree* applicable?

It seems to us to be unmistakably apparent that these castigating denunciations, together with the references which Appellee makes to the two judgments for contempt imposed upon Vincent Hallinan during the same trial (BFA 4: neither one of which is final at this writing) and the reference to the two State Court contempt convictions of Vincent Hallinan (BFA 16, 17: one in 1925 and the other in 1932), were inserted

in Appellee's Brief *with the hope that they would find some lingering spark of prejudice or resentment among the members of this Court and would bellow it into a searing flame of rage and injudicious action. It seems to us self evident that these things constitute an appeal to passion and prejudice and not to reason and fair consideration.*

There are many other things in the brief for Appellee concerning which we would comment did space limitations permit. To commence a comment on any one of them, however, would run us over the twenty-page limitation. We trust that we will have time on oral argument to refute the ones which seem to need refutation.

Dated, San Francisco, California,
April 2, 1951.

Respectfully submitted,
WILLIAM F. CLEARY,
Attorney for Appellant.